CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 31 JULY 23, 1997 NO. 30

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 97–59)

REVOCATION OF CUSTOMS BROKER LICENSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Broker license revocation.

SUMMARY: Notice is hereby given that the Commissioner of Customs, pursuant to Section 641, Tariff Act of 1930, as amended, (19 U.S.C. 1641), and Parts 111.51 and 111.74 of the Customs Regulations, as amended (19 CFR 111.51 and 111.74), canceled the following Customs broker license without prejudice.

Port	*Individual*	*License #*
New York	Harry O. Eckert	1584
New York	Vincent Gurge	2331
New York	Walter Duncan	4319
New York	Irving G. Friedman	0002A
New York	Lester L. Meinstein	1791
New York	Vito Pipitone	3421
New York	FNS Corporation	3181
Houston	Sam Martinez	6282

Dated: July 3, 1997.

PHILIP METZGER,
Director,
Trade Compliance.

[Published in the Federal Register, July 14, 1997 (62 FR 37642)]

(T.D. 97–60)

REVOCATION OF CUSTOMS BROKER LICENSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Broker license revocation.

SUMMARY: Notice is hereby given that the Commissioner of Customs, pursuant to Section 641, Tariff Act of 1930, as amended, (19 U.S.C. 1641), and Parts 111.51 and 111.74 of the Customs Regulations, as amended (19 CFR 111.51 and 111.74), canceled the following Customs broker licenses without prejudice.

Port	*Individual*	*License #*
New York	Bruno J. Trocciola	3087
New York	Wolf D. Barth	4681
New York	William Arthur Marshall	3924
New York	Deborah J. Schecter	9545
New York	Naomi Meyer (Skinner)	4801
New York	Raymond Tarnok	13062
New York	Bernard Levine	2459

Dated: July 3, 1997.

PHILIP METZGER,
Director,
Trade Compliance.

[Published in the Federal Register, July 14, 1997 (62 FR 37643)]

(T.D. 97–61)

REVOCATION OF CUSTOMS BROKER LICENSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Broker license revocation.

SUMMARY: Notice is hereby given that the Commissioner of Customs, pursuant to Section 641, Tariff Act of 1930, as amended, (19 U.S.C. 1641), and Parts 111.52 and 111.74 of the Customs Regulations, as amended (19 CFR 111.52 and 111.74), the following Customs broker licenses are canceled with prejudice.

Port	*Individual*	*License #*
New York	A.I.F.S., Inc.	6302
Los Angeles	John V. Urbano	6884

Dated: July 3, 1997.

PHILIP METZGER,
Director,
Trade Compliance.

[Published in the Federal Register, July 14, 1997 (62 FR 37643)]

(T.D. 97–62)

REVOCATION OF CUSTOMS BROKER LICENSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Broker license revocation.

SUMMARY: Notice is hereby given that the Commissioner of Customs, pursuant to Section 641, Tariff Act of 1930, as amended, (19 U.S.C. 1641), and Parts 111.51 and 111.74 of the Customs Regulations, as amended (19 CFR 111.51 and 111.74), canceled the following Customs broker license without prejudice.

Port	*Individual*	*License #*
Seattle	William D. White	1875
Seattle	A.B. International Freight Services, Inc.	13609
Seattle	C.F.T. Omni, Inc.	12129
Seattle	Marvin L. Nelson Company	11829
Seattle	Clarence J. Swift	3532

Dated: July 3, 1997.

PHILIP METZGER,
Director,
Trade Compliance.

[Published in the Federal Register, July 14, 1997 (62 FR 37643)]

(T.D. 97–63)

REVOCATION OF CUSTOMS BROKER LICENSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Broker license revocation.

SUMMARY: Notice is hereby given that the Commissioner of Customs, pursuant to Section 641, Tariff Act of 1930, as amended, (19 U.S.C. 1641), and Parts 111.51 and 111.74 of the Customs Regulations, as amended (19 CFR 111.51 and 111.74), canceled the following Customs broker licenses without prejudice.

Port	*Individual*	*License #*
New York	Vicent DiPilato	5407
New York	John M. Poole	8050
New York	Dominick Maccone	3471
New York	Edward Michael Keane	2662
New York	Vincent V. Czajkowski	2983
New York	Helmut Klestadt	3128
New York	P.S. Clearance Co., Inc.	7811

Dated: July 3, 1997.

PHILIP METZGER,
Director,
Trade Compliance.

[Published in the Federal Register, July 14, 1997 (62 FR 37643)]

19 CFR Parts 101 and 122

(T.D. 97–64)

CUSTOMS SERVICE FIELD ORGANIZATION; ESTABLISHMENT OF SANFORD PORT OF ENTRY

AGENCY: Customs Service, Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations pertaining to Customs field organization by establishing a new port of entry at Sanford, Florida, and deleting the Sanford Regional Airport from the list of user-fee airports. The new port of entry, designated Orlando-Sanford Airport, is located in Central Florida. This change will assist the Customs Service in its continuing efforts to achieve more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the general public.

EFFECTIVE DATE: November 10, 1997.

FOR FURTHER INFORMATION CONTACT: Harry Denning, Office of Field Operations, Resource Management Division (202) 927–0196.

SUPPLEMENTARY INFORMATION:

BACKGROUND

In 1991 Sanford Regional Airport began operating as a user-fee airport. By 1993, a report prepared for the Central Florida Regional Airport Board, which manages the airport at Sanford, showed Sanford Regional Airport as the fastest growing airport for international pas-

senger clearance services in Florida. Applying the criteria used by Customs since 1973 for establishing ports of entry (*see*, Treasury Decision (T.D.) 82–37 (47 FR 10137), as revised by T.D. 86–14 (51 FR 4559) and T.D. 87–65 (52 FR 16328)), to the figures projected by the Central Florida Regional Airport Board, Customs believed that sufficient justification existed for redesignating the airport facility from its user-fee status to that of a port of entry.

The report projected that in an approximate six-month period in 1996 the airport would process over 100,000 international passengers. (For 1996, the actual number of international passengers processed exceeded 272,000.) As Customs criteria specify a minimum annual workload of 15,000 international air passengers for establishment of a port of entry, the Sanford airport facility clearly met that criterion. The modes of transportation serving the port of entry and the minimum population base within the immediate service area also are adequate to establish a port of entry at Sanford. Accordingly, Customs proposed to establish the port of entry in the belief that such a designation would help Customs achieve the more efficient use of its personnel, facilities, and resources, and provide better services to carriers, importers, and the public in Central Florida.

On June 17, 1996, Customs published a notice of proposed rulemaking in the Federal Register (61 FR 30552) that solicited comments concerning a proposal to amend § 101.3(b), Customs Regulations (19 CFR 101.3), by establishing a new port of entry at Sanford, Florida, and § 122.15(b), by removing the Sanford Regional Airport from the list of user-fee airports.

The public comment period for the proposed amendments closed July 9, 1996.

Discussion of Comments

Five comments were received: two in favor and three against. A discussion of the comments follows:

Comment:

Two commenters argue that there is no present legal authority or existing procedure that allows Customs to force any airport to become a port of entry against its desire, *i.e.*, without the airport itself initiating the request for a change in status, and the third commenter argues that since there has been no such request made, Customs decision to change the status constitutes an arbitrary determination. One of the commenters further argues that the statute providing for the rearranging of customs districts (19 U.S.C. 2) appears to permit the establishment of ports of entry only in connection with replacing another port or ports that have been discontinued.

One of the commenters (a private terminal operator) also states that it decided to develop its new international terminal facility at Sanford based on that facility remaining a user-fee airport; that to change the airport's designation to that of a port of entry could completely undermine the operator's legitimate business expectations regarding a devel-

opment project backed by millions of private investment dollars, and would frustrate the operator's ability to use its facility for the only purpose for which it is economically viable. In short, the commenter believes that the establishment of a port of entry at the Sanford airport and the termination of the airport's user-fee status would be grossly and patently unfair and, without compensation by the government, would amount to an unconstitutional taking.

Customs Response:

The statutory scheme which establishes Customs field organization to administer and enforce the customs and related laws of the United States is found at 19 U.S.C. 1 and 2, which allow for ports of entry, and at 19 U.S.C. 58b, which allows for user-fee arrangements at certain small facilities.

Section 2 of title 19 of the United States Code (19 U.S.C. 2), allows for the rearrangement and limitation of districts and the changing of locations. This statute, in part, authorizes the President from time to time, as the exigencies of the service may require, to rearrange, by consolidation or otherwise, the several customs collection districts and to discontinue ports of entry by abolishing the same or establishing others in their stead. In 1951, the President delegated his authority to the Secretary of the Treasury (Exec. Order 10289 of September 17, 1951, 16 FR 9499, 3 CFR parts 1949–1953 Comp. p. 787, *reprinted in* 3 U.S.C. 301 note) who, in 1995, delegated the authority to the Deputy Assistant Secretary for Regulatory, Tariff, and Trade Enforcement (19 CFR 101.3(a)). Further, unlike the statute providing for the establishment of a user-fee facility, this statute does not require any local consent in the establishment of a port of entry. The criteria Customs employs to determine whether a facility should be designated as a port of entry are not regulatory, and were published as specified above so that communities seeking new or expanded Customs services could justify to Customs the expense of maintaining a new office or expanding service at an existing location.

Customs does not agree with the commenter's argument that the statute permits the establishment of ports of entry only in connection with the simultaneous replacement of another port or ports that have been discontinued. The Secretary has interpreted 19 U.S.C. 2 to provide authority to the President and his delegate to establish ports of entry without the simultaneous abolition of other ports. *See, e.g.*, T.D. 95–62 (60 FR 41804, dated Aug. 14, 1995, providing for the port of entry at Rockford, Illinois) and T.D. 96–3 (60 FR 67056, dated Dec. 28, 1995, providing for the port of entry at Sioux Falls, South Dakota). While the Secretary has not abolished ports of entry simultaneously with the establishment of these ports of entry, the number of ports of entry has actually decreased. Thus, the interpretation of this statute suggested by the commenter is contrary to the position of the Treasury Department as reflected in longstanding practice and the plain language of the statute grants the Secretary, as the President's delegate, the authority to de-

termine that the exigencies of the Customs Service require that Sanford be designated as a port of entry.

Section 58b of title 19 of the United States Code (19 U.S.C. 58b), entitled "User Fee for Customs Services at Certain Small Airports and Other Facilities," provides, in part, that the Secretary may designate airports, seaports, and other facilities as recipients of customs services on a fee-basis only if he has made a determination that the volume or value of business cleared through such facility is insufficient to justify the availability of customs services at such facility. But when the volume or value of business cleared through such a designated user-fee facility reaches such a level justifying the availability of customs services at the facility, Customs may make a determination concerning that facility's continuing status within Customs field organization. This is the circumstance which has overcome Sanford; based on its own report, not that of Customs, international passenger workload figures are far in excess of those normally considered adequate for port of entry status. Accordingly, Customs has made a determination that the volume of business cleared through this facility is no longer "insufficient to justify the availability of customs services" at this facility and that Sanford should be designated as a port of entry. Concerning port of entry status, it should be noted that facilities are usually helped by this designation, as they are able to offer permanent and a full range of Customs services instead of just temporary and limited ones that are based on a user-fee arrangement.

Concerning the regulatory takings argument advanced, it is Customs position that a change in designation of a particular field location does not constitute a taking of property for public use.

Comment:

One commenter states that all user-fee airports should be treated similarly and that the proposed action threatens all other small user-fee airports, such as Daytona Beach and Melbourne, Florida, who now may be pushed into port of entry status with its associated higher costs. The commenter alleges that unequal and discriminatory treatment is being imposed on Sanford; the commenter claims that user-fee airports at Ft. Myers, Florida and Wilmington, Ohio for years have exceeded the minimum criteria for establishing port of entry status, whereas, Sanford's status is to be changed based on projected passenger counts.

Customs Response:

There is nothing automatic about when a facility's designation must be changed into another designation. As discussed above, Customs field organization is based on the needs of the entire Customs Service, as determined by the Secretary of the Treasury.

Concerning the referenced user-fee airports located at Ft. Myers and Wilmington, Customs is currently looking into whether Ft. Myers, Florida, should be redesignated as a port of entry; in the case of Wilmington, Ohio, Customs has already determined that that location does not meet any of the criteria for port of entry status.

Comment:

One commenter claims that because there was no local request for port of entry status Customs has *de facto* established, without proper notice, a new, broadly applicable procedure for creating new ports of entry, which possibly violates the requirement of 5 U.S.C. 551 [sic] that each agency publish "the nature and requirements of all formal and informal procedures available." The commenter asserts that before applying this new procedure in a specific case, Customs should publish a general notice alerting the public to the new procedure.

Customs Response:

This comment misinterprets the public information requirements of the Administrative Procedure Act (APA) and the publication of the criteria for establishing ports of entry. Regarding the APA, section 552 of the APA (5 U.S.C. 552) requires, in part, that agencies publish in the Federal Register information pertaining to descriptions of its central and field organization for informational purposes, which Customs does in Part 101 of the Customs Regulations. Concerning the notice and public comment procedures of section 553 of the APA (5 U.S.C. 553), which applies to agency rulemaking, Customs has followed these procedures in its proposal to change the designation of Sanford Airport.

Regarding the publication of the criteria for establishing ports of entry, no new procedure for establishing ports of entry has been established. As stated above, the authority to designate ports of entry is a plenary authority vested in the President or his delegate under the provisions of 19 U.S.C. 2. Customs publication of the criteria for establishing ports of entry does not operate to inhibit that plenary authority to establish ports of entry "as the exigencies of the Service may require," but rather serves to inform those communities interested in obtaining such government capabilities to focus their requests for such status on the criteria actually utilized by the Treasury Department.

CONCLUSION

After analysis of the comments and further review of the matter, Customs has determined that Sanford Regional Airport no longer qualifies as a small, user-fee facility under the provisions of 19 U.S.C. 58b, and that Customs needs in the administration and enforcement of customs and related laws would best be served by establishing Sanford as a port of entry. Accordingly, Customs has decided to adopt the proposed amendments to Part 101 and 122 of the Customs Regulations, published in the Federal Register on June 17, 1996 (61 FR 30552). However, a delayed effective date is observed because this document will serve as the written notice of termination of user-fee status to the Sanford Regional Airport as required by § 122.15(c).

THE REGULATORY FLEXIBILITY ACT, AND EXECUTIVE ORDER 12866

Pursuant to provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.),* it is certified that these amendments will not have a significant economic impact on a substantial number of small entities, as these

amendments concern the status of only one airport facility. Accordingly, these amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604. These amendments do not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

LIST OF SUBJECTS

19 CFR Part 101

Customs duties and inspection, Customs ports of entry, Exports, Imports, Organization and functions (Government agencies), Reporting and recordkeeping requirements.

19 CFR Part 122

Air carriers, Aircraft, Airports, Air transportation, Customs duties and inspection, Organization and functions (Government agencies), Reporting and recordkeeping requirements.

AMENDMENTS TO THE REGULATIONS

For the reasons stated above, parts 101 and 122 of the Customs Regulations (19 CFR parts 101 and 122) are amended as set forth below:

PART 101—GENERAL PROVISIONS

1. The general authority citation for Part 101 and the specific authority for § 101.3 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 2, 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1623, 1624.

Section 101.3 and 101.4 also issued under 19 U.S.C. 1 and 58b;

* * * * * * *

2. Section 101.3(b)(1) is amended by adding, in appropriate alphabetical order, under the state of Florida "Orlando-Sanford Airport" in the "Ports of entry" column and "T.D. 97–64" in the adjacent "Limits of port" column.

PART 122—AIR COMMERCE REGULATIONS

1. The authority citation for Part 122 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1433, 1436, 1459, 1590, 1594, 1623, 1624, 1644,; 49 U.S.C.App. 1509.

2. Section 122.15(b) is amended by removing "Sanford, Florida" from the column headed "Location" and, on the same line, "Sanford Regional Airport" in the column headed "Name".

GEORGE J. WEISE,
Commissioner of Customs.

Approved: March 24, 1997.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, July 11, 1997 (62 FR 37131)]

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, July 9, 1997.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

REVOCATION OF RULING LETTER RELATING TO CLASSIFICATION OF KEYBOARD DUST COVER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of a keyboard dust cover. Notice of the proposed modification was published May 28, 1997, in the CUSTOMS BULLETIN, Volume 31, Number 22.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after September 22, 1997.

FOR FURTHER INFORMATION CONTACT: Josephine Baiamonte, Textile Branch, (202) 482–7058.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On May 28, 1997, Customs published a notice in the CUSTOMS BULLETIN, Volume 31, Number 22, proposing to revoke District Decision (DD)

897441, dated May 5, 1994. In DD 897441 the tariff classification of a keyboard dust cover was determined to be in heading 6307, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Since that time, Customs has had a chance to review that decision and has determined that it is in error. The proper tariff classification for the keyboard dust cover, as is reflected in numerous Customs decisions, is in heading 6304, HTSUSA.

No comments were received in response to our notice of intent to revoke DD 897441.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of a keyboard dust cover. HQ 960435 revoking DD 897441 is set forth as an attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: July 7, 1997.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, July 7, 1997.

CLA–2 RR:TC:TE 960435
Category: Classification
Tariff No. 6304.92.000

GAIL T. CUMINS, ESQ.
SHARRETTS, PALEY, CARTER & BLAUVELT, P.C.
67 Broad Street
New York, NY 10004

Re: Revocation of DD 897441, dated May 5, 1994; classification of keyboard dust cover

DEAR MS. CUMINS:

On May 5, 1994, our Portland, Maine office issued to you District Decision (DD) 897441, regarding the classification of a keyboard dust cover. Since that time, Customs has had a chance to review that decision and has determined that it is inconsistent with numerous Customs rulings addressing the same or virtually identical merchandise. Accordingly, this letter will set out the proper analysis and classification for the keyboard dust cover.

Pursuant to section 625 (c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the pro-

posed revocation of DD 897441 was published on May 28, 1997, in the CUSTOMS BULLETIN, Volume 31, Number 22.

Facts:

The subject merchandise consists of a keyboard dust cover measuring approximately 20 inches by 10 inches with tapered sidewalls sloping from a high point of two inches in the back. It is rectangularly shaped and is designed to fit loosely over computer keyboards as protection against dust.

Issue:

What is the proper classification for the subject merchandise.

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI's). GRI 1 requires that classification be determined according to the terms of the headings and any relative section or chapter notes, taken in order. Where goods cannot be classified solely on the basis of GRI 1, the remaining GRI's will be applied, in the order of their appearance.

Heading 6304, HTSUS, provides for other furnishing articles. Within this provision are classified a variety of articles generally found in the home. Appliance covers, similar to the subject keyboard dust cover, have been classified by Customs in heading 6304, HTSUS. *See, e.g.*, New York Ruling Letters (NY) 859321, dated January 31, 1991, regarding the classification of a curling iron cover/holder; NY 815482, dated October 19, 1995, regarding the classification of toaster and toaster oven covers; and NY 818573, dated February 9, 1996, regarding the classification of, among other things, a toaster cover. Those appliance covers were determined to be classified in heading 6304, HTSUS, because they were both decorative and protective in nature.

Similarly, the subject merchandise has both a decorative use, that is, the cover is meant to be seen and left out on display, and a functional use, it protects against dust and any other foreign matter getting on to the keyboard. Accordingly, the subject merchandise is properly classified in heading 6304, HTSUS.

DD 897441 is hereby revoked. The proper classification of the keyboard dust cover is in heading 6304, HTSUS.

Holding:

The subject keyboard cover, if made of cotton, is properly classified in subheading 6304.92.0000, HTSUSA, which provides for other furnishing articles, excluding those of heading 9404: other: not knitted or crocheted, of cotton. The applicable general rate of duty is 6.9 percent *ad valorem* and the textile quota category is 369. If made of synthetic fibers, it is properly classifiable in subheading 6304.93.0000, HTSUSA. The applicable general rate of duty is 10.2 percent *ad valorem* and the textile quota category is 666. If made of other textile materials, other than cotton or synthetic fibers, it is classified in the appropriate provision under subheading 6304.99, HTSUSA.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent negotiations and changes, we suggest that your client check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an issuance of the U.S. Customs Service, which is updated weekly and is available at the local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, your client should contact the local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

Accordingly, DD 897441, dated May 5, 1994, is hereby revoked.

In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF CERTAIN NITRIDED VANADIUM PRODUCTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking New York Ruling Letter (NYRL) 803793, dated December 9, 1994, concerning the classification of certain nitrided vanadium products.

EFFECTIVE DATE: Merchandise entered or withdraw from warehouse for consumption on or after September 22, 1997.

FOR FURTHER INFORMATION CONTACT: Norman W. King, Food and Chemicals Classification Branch, Office of Regulations and Rulings (202) 482–7097.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On May 28, 1997, Customs published in the CUSTOMS BULLETIN, Volume 31, Number 22, a notice of a proposal to revoke NYRL 803793, dated December 9, 1994, which held that certain nitrided vanadium products were classified as nitrides of vanadium, in subheading 2805.00.20, Harmonized Tariff Schedule of the United States (HTSUS), with a 1994 general rate of duty of 16 percent *ad valorem* and with a 1997 general rate of duty of 12.8 percent *ad valorem*.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking NYRL 803793 to reflect the proper classification of the products in subheading 2849.90.50, HTSUS, as carbides other than of calcium, silicon, boron, chromium, and tungsten, with a 1994 and a 1997 general rate of duty of 3.7 percent *ad valorem*. Headquarters Ruling Letter 959438 revoking NYRL 803793, is set forth in the attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: July 7, 1997.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, July 7, 1997.

CLA–2 RR:TC:FC 959438K
Category: Classification
Tariff No. 2849.90.50

JENNIFER DE LAURENTIIS, ESQ.,
CHERYL ELLSWORTH, ESQ., AND
JEFFREY S. LEVIN, ESQ.
HARRIS & ELLSWORTH, ATTORNEYS AT LAW
THE WATERGATE
2600 Virginia Avenue, N.W., Suite 1113
Washington, DC 20037–1905

Re: Revocation of New York Ruling Letter (NYRL) 803793, Dated December 9, 1994; Nitrided Vanadium Products.

DEAR MS. DE LAURENTIIS, MS. CHERYL ELLSWORTH, AND MR. JEFFREY S. LEVIN:

In response to your letter dated October 27, 1994, on behalf of your client, Shieldalloy Metallurgical Corporation, the Customs Service issued NYRL 803793, dated December 9, 1994, which held that the Nitrided Vanadium products described therein were classified as other nitrides of vanadium, in subheading 2850.00.20, Harmonized Tariff Schedule of the United States (HTSUS), with a 1994 general rate of duty of 16 percent *ad valorem* and now with a 1997 general rate of duty of 12.8 percent *ad valorem*.

This letter is to inform you that NYRL 803793 no longer reflects the views of the Customs Service and is revoked in accordance with section 177.9(d) of the Customs Regulations (19 CFR 177.9(d)). Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), hereinafter, section 625), notice of the proposed revocation of NYRL 803793 was published on May 28, 1997, in the CUSTOMS BULLETIN, Volume 31, No. 22. The following represents our position.

Facts:

There are two Nitrided Vanadium products described in NYRL 803793, that are identical in composition except for the nitrogen contents; one contains 7.0 percent nitrogen and the other contains 12.0 percent nitrogen. The other elements in Nitrided Vanadium 7, and Nitrided Vanadium are, 80 percent vanadium, 0.05 percent silicon, 0.05 percent aluminum, 0.03 manganese, 0.02 phosphorus, 0.02 sulfur, 0.01 percent chromium and 0.01 percent nickel. The products are used for the strengthening of low alloy steel.

Issue:

The issue is whether the products as described above are classified as nitrides of vanadium in subheading 2850.00.20, HTSUS, or as other carbides, in subheading 2849.90.50, HTSUS.

Law and Analysis:

Heading 2849, HTSUS, covers carbides, whether or not chemically defined. Subheading 2849.90.50, HTSUS, provides for such carbides other than of calcium, silicon, boron, chromium, and tungsten. Heading 2850, HTSUS, provides for hydrides, nitrides, azides, silicides and borides, whether or not chemically defined, other than compounds which are also carbides of Heading 2849. Subheading 2850.00.20, HTSUS provides for nitrides of vanadium. However, heading 2850 excludes coverage of compounds which are also carbides of heading 2849.

The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and General Rules of Interpretation of the HTSUS. Note C to the EN for heading 2849, states as follows, that the heading covers

> Compounds consisting of one or more metal elements combined with carbon and another nonmetal element, e.g. aluminum borocarbide, zirconium carbonitride, tita-

nium carbonitride. The proportions of the elements in some of these compounds may not be stoichiometric.

The products are compounds. Each product is composed of a metal (vanadium) combined with carbon and another nonmetal (nitrogen). As stated in the EN for heading 2849, the proportions of the elements in these compounds need not be stoichiometric. We conclude that the products are classified as carbides in heading 2849, HTSUS.

Holding:

The Nitrided Vanadium products described above are classified as carbides other than of calcium, silicon, boron, chromium, or tungsten, in subheading 2849.90.50, HTSUS, with a 1994 and a 1997 general rate of duty of 3.7 percent *ad valorem*.

NYRL 803793, dated December 9, 1994, is revoked.

In accordance with 19 U.S.C. 1625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), of the Customs Regulations (19 CFR 177.10(c)(1)).

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

PROPOSED REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF AUTOMOTIVE WHEEL HUB UNIT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling relating to the tariff classification of automotive wheel hub units. These articles are double row, angular contact ball bearings designed for use on either a front or rear non-driven wheel. Customs invites comments on the correctness of the proposed revocation.

DATE: Comments must be received on or before August 22, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington, D.C. 20229. Submitted comments may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th. Street, N.W., Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Tariff Classification Appeals Division (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling relating to the tariff classification of automotive wheel hub units. Customs invites comments on the correctness of the proposed revocation.

In *NY* 853708, dated July 6, 1990, an automotive wheel hub unit, designated Wheel Hub 2, was held to be classifiable under the provision for other parts and accessories of motor vehicles, in subheading 8708.60.50, Harmonized Tariff Schedule of the United States (HTSUS). This ruling was based on the fact that the outer ring formed a flange and spigot which were believed to demonstrate functions which are in excess of those normally associated with ball or roller bearings. *NY* 853708 is set forth as "Attachment A" to this document.

Further review of the available information now indicates the flanged outer ring of Wheel Hub 2 is a lightweight structural component which, together with the spigot, permit the brake and wheel to be centered and mounted. It is Customs position that the flanged outer ring with spigot is a design feature that facilitates attachment and support of the wheel and brake drum assembly. Similar design features are common to ball bearings and do not detract from the wheel hub unit's primary friction-reducing function. This design feature, therefore, is not sufficient to remove the merchandise from the scope of heading 8482, HTSUS, which provides for ball or roller bearings, and parts thereof.

Customs intends to revoke *NY* 853708 to reflect the proper classification of Wheel Hub 2 under subheading 8482.10.50, HTSUS, as other ball bearings. Before taking this action, we will give consideration to any written comments timely received. Proposed *HQ* 960049 revoking *NY* 853708 is set forth as "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: July 8, 1997.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
New York, NY, July 6, 1990.

CLA–2–87:S:N:N1:101 853708
Category: Classification
Tariff No. 8708.60.5000

MR. JOHN A. SLAGLE
WOLF D. BARTH CO. INC.
7575 Holstein Ave.
Philadelphia, PA 19153

Re: The tariff classification of automotive wheel hub units from France.

DEAR MR. SLAGLE:

In your letter dated June 11, 1990, on behalf of SKF U.S.A., Inc., King of Prussia, PA. you requested a tariff classification ruling.

The automotive wheel hub assembly which you have presented for classification is described by you as an SKF Wheel Hub 2 (Series BAFB) which will be manufactured in France. You describe Hub Unit 2 as a double row, angular contact ball bearing. It is designed for use on either a front or rear non-driven wheel. Its outer ring forms a flange and a spigot, thereby incorporating the function of the wheel hub. Since the bearing is fitted onto the front spindle, the lock nut, brake disc and the wheel can be easily bolted on. The unit in question is designed specifically for incorporation as the front wheel hub on the Lincoln Town Car. You have included a drawing of the front wheel hub on the Lincoln Town Car.

This unit demonstrates functions which are in excess of those normally associated with ball or roller bearings. It has been advanced to the stage where it could be considered a wheel hub assembly rather than a wheel bearing.

The applicable subheading for the wheel hub assembly Hub Unit 2 will be 8708.60.5000, Harmonized Tariff Schedule of the United States (HTS), which provides for non-driving axles and parts thereof for vehicles of heading 8703. The rate of duty will be 3.1 percent *ad valorem*.

It is the opinion of this office that the Hub Unit 2 would be subject to the current Anti Dumping (ADA) margins in effect for hall/roller bearing imports from France. Please contact your local port for confirmation of the applicable case number and dumping margin. If you wish a binding decision on the applicability of dumping to this product, please contact the Department of Commerce.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:MM 960049 JAS
Category: Classification
Tariff No. 8482.10.50

MR. JOHN A. SLAGLE
WOLF D. BARTH CO., INC.
7575 Holstein Ave.
Philadelphia, PA 19153

Re: *NY* 853708 Revoked; automotive wheel hub unit, wheel hub 2, double row, angular contact ball bearing with flanged outer ring and spigot for mounting on front or rear non-driven wheel; HQ 950771.

DEAR MR. SLAGLE:

In *NY* 853708, dated July 6, 1990, issued to you by the Area Director of Customs, New York Seaport, on behalf of SKF U.S.A., Inc., the SFK Wheel Hub 2 (Series BAFB), was held to be classifiable in subheading 8708.60.50, Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed this classification and now believe that it is incorrect.

Facts:

As described in *NY* 853708, the automotive wheel hub assembly designated the SKF Wheel Hub 2 (Series BAFB), is a double row, angular contact ball bearing. Although designed for use either on a front or rear non-driven wheel, this wheel hub unit is designed specifically for incorporation as the front wheel hub on the Lincoln Town Car. Submitted literature describes the flanged outer ring of Wheel Hub 2 as a lightweight structural component with threaded holes or studs and a spigot to center and mount the brake and wheel.

Issue:

Whether the flanged outer ring and spigot design configuration of Wheel Hub 2 removes it from heading 8482, HTSUS, as ball or roller bearings, and parts thereof.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The **Harmonized Commodity Description and Coding System Explanatory Notes (ENs)** constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the **ENs** provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the **ENs** should always be consulted. *See* T.D. 89–80. 54 Feb. Reg. 35127, 35128 (Aug. 23, 1989).

Relevant **ENs** at p. 1433 state in part that heading 84.82 covers all ball, roller or needle roller type bearings. They are used in place of smooth metal bearings and enable friction to be considerably reduced. Normally, bearings consist of two concentric rings (races) enclosing the balls or rollers, and a cage which keeps them in place and ensures that their spacing remains constant. The heading includes ball bearings with single or double rows of balls.

NY 853708 states, in part, that Wheel Hub 2 demonstrates functions which are in excess of those normally associated with ball or roller bearings. However, it is apparent that for ball or roller bearings to function as friction-reducing elements they must necessarily have design features which permit them to attach to a shaft or machinery part with which they will be used. It is our opinion that only a design feature or features which imparts a significant additional non-friction reducing capability to a ball or roller bearing will remove that bearing from the scope of heading 8482. In this case, the available information indicates the flanged outer ring and spigot on Wheel Hub 2, described as a lightweight structural component, facilitate centering and mounting of the brake and wheel. We are now of the opinion that this is a design feature common to ball or roller bearings of this type that does not impart a significant nonfriction-reducing capability. As such, Wheel Hub 2 remains within

the scope of heading 8482. The fact that Wheel Hub 2 may be designed specifically for incorporation as the front wheel hub on the Lincoln Town Car is not legally relevant because many ball or roller bearing types are manufactured to specific engineering and design criteria and are purchased with a particular application in mind. *See HQ* 950771, dated March 23, 1992, and related rulings. Heading 8482 describes a commodity eo nomine, by name. In the absence of a contrary legislative intent, judicial decision, or administrative practice, and without proof of commercial designation, an unlimited eo nomine designation will include all forms of the named article.

Holding:

Under the authority of GRI 1, the automotive wheel hub unit designated Wheel Hub 2 (Series BAFB) is provided for in heading 8482. It is classifiable in subheading 8482.10.50, HTSUS. *NY* 853708, dated July 6, 1990, is revoked.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

PROPOSED REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF CERTAIN GARMENT BAGS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of certain garment bags. Comments are invited on the correctness of the proposed ruling.

EFFECTIVE DATE: Comments must be received on or before August 22, 1997

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention; Tariff Classification Appeals Division, 1301 Constitution Avenue NW, (Franklin Court) Washington, DC 20229. Comments submitted may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: John Elkins, Textile Branch (202) 482–7050.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Moderniza-

tion) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of certain garment bags.

In New York Ruling Letter (NY) A86324, dated February 14, 1997, Style Nos. 04730, SCP1, SY3, and SBP0021 were classified in subheading 4202.92.4500 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for travel, sport and similar bags, with outer surface of a sheeting of plastics. NY A86324 is set forth in Attachment A to this document.

The importer requested reconsideration of NY A86324 and after further review of the ruling, Customs is of the opinion that the subject garment bags which are comprised of vinyl less than 4 mils in thickness are classifiable in subheading 3923.90.00, HTSUSA. Therefore, Customs intends to revoke NY A86324 to reflect the proper classification of the garment bags in 3923.90.00, HTSUSA, the provision for articles for the conveyance or packing of goods, of plastics. Proposed HQ 960411 revoking NY A86234 is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: July 7, 1997.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, February 14, 1997.

CLA–2–95:RR:NC:3:341 A86324
Category: Classification
Tariff No. 4202.92.4500

MS. AMY J. JOHANNESEN
SIEGEL, MANDELL & DAVIDSON, P.C.
ONE ASTOR PLAZA
1515 Broadway
New York, NY 10036–8901

Re: The tariff classification of garment bags (garment carriers), from China, HTSUSA 4202.92.4500.

DEAR MS. JOHANESEN

In your letter dated August 2, 1996, supplemented October 23, 1996, you requested a tariff classification decision for four items described as garment bags. The request is on behalf of I. Shamah & Sons, Inc., dba VIPAC.

The samples submitted are basic garment carriers manufactured of Polyvinyl Chloride (PVC), embossed or calendared, plastic sheeting. The bags are identified as styles 04730, SCP1, SBP0021 and SY3. Each item is a zippered garment bag of the kind normally sold at retail as a traveling and/or storage bag for one or more garments and are alternately known as "garment bags" or "garment carriers". Such bags are usually packaged in polyethylene packaging with printed paper headers and sold at retail as rack goods. The bags do not have handles and are designed to be carried with the person by means of a clothes hanger which will protrude from the top. Each has a full length nylon coil zipper closure on the front. The zipper tape is securely sewn to the turned and stitched edge of the bag by means of nylon thread and PVC binding. All other edges are reinforced with stitched binding. All binding is of matching color as the plastic sheeting except style 04730 which has a contrasting gold binding with a black sheeting. The plastic sheeting of styles SY–3, 04730, and SCP–1 is embossed to impart a simulated nylon textile material. The sheeting of style SBP–0021 is processed to have a crinkle pattern which simulates a leather material. Style 04730 has a three inch side gusset and appears to be designed to contain either more than one garment or a large item such as a coat. It is imprinted with the name "Norstrom" which is indicative that a better quality garment will be carried within. The balance of the bags have no gusset and appear to be designed to carry one garment. Style SP 0021 is printed with the name "Neiman Marcus" which is also indicative that a better quality garment will be carried within. SCP–1 is imprinted with the name "shirt corner Plus, the Complete Men's Store". Style SY–1 has no imprint. The zipper pulls and sliders of each are molded with the name "VIPAC" and are of matching color as the plastic sheeting. The samples have been destroyed in examination.

The instant styles are representative of items sold by VIPAC to various retail establishments to be given to their retail customers of usually better quality garments after purchase of the garment. The imprinted name of the retail business serves as a continuing advertisement to the public each time the bag is carried which is the intended purpose of the imprint. In the case of the better quality names, it is synonymous with a person carrying a bag bearing a recognized trademark. The bags are particularly distinct from the usual type of disposable polyethylene packaging covers within which a retail business would place a garment(s) prior to the sale of the garment. The bags are designed to provide continuing storage and protection while providing a degree of portability for the garment(s) contained within.

In your letter of August 2, 1996, you stated that the bags are of a flimsy construction and not designed for repetitive use. The articles are said to be classified within tariff number 3923.90.00, Harmonized Tariff System of the United States, Annotated (HTSUSA, which provides, in part, for "Articles for the conveyance or packing of goods, of plastics; * * *."

The question of bags and containers being articles classified within heading 3923 has been addressed in several Customs ruling decisions. Decisions such as HQ 958174, January 31, 1996, 955660 September 27, 1994, 955047, October 6, 1994. and 954072, September 2, 1993. These decisions emphasize that articles which are said to be classified in Heading 3923 are subject to Chapter 39, Legal Note (2) (ij) which excludes articles of Heading 4202, HTSUSA, from classification within Chapter 39. The decisions, especially 958174 and 955660 which dealt with articles of substantially the same construction and purpose as the instant, found the articles to be of a kind similar to those of Heading 4202 because they are in themselves a personal effect (property) and are bags which provide organization, storage, protection and transport to a personal effect during travel. The decisions note that Heading 3923 provides for cases and containers of bulk goods and commercial goods and not personal items. The instant garment bags are not such articles because they are designed to contain a the personal effect which is not a commercial good since after the point of purchase the garment is no longer in the stream of commerce. *Imperial Packaging Corp. v. United States,* 2 CIT 250, Slip Op. 81–111, is noted. In addition, the bags are of a kind sold at retail on their own merits and which also become personal effects after the point of purchase.

The remaining question is whether or not the bags are of a kind classified within Heading 4202, HTSUSA. It has been an established fact that the classification within Heading 4202 is the broad spectrum of articles enumerated. The position of the court in *Totes. Inc. v. United States,* Slip Op. 94–154, is particularly pertinent. In that decision the Court held that an article is of a kind similar to those of heading 4202 provided it exhibits the characteristics of the Heading taken as a whole. The Court found that if an article possessed characteristics such as organization, storage, protection, and to carry, it would be considered to

be of a kind similar to those of the Heading. It is significant to note that the Court placed a minimal value on the ability to transport or carry the contents as well as the quality of the article. Although the ability to transport or carry the personal effect within would direct attention to the article being a traveling bag as described in chapter 42, Additional U.S. Note 1 and classified within subheading 4202.92. The Court, in Totes, utilized the same garment bags as an example to demonstrate its reasoning. (Totes, at page 14) The decision and comment regarding garment bags are applicable to the instant.

It has been a consideration that an imported article must be of a construction suitable for travel bag to be classified within that subheading. Although, the position of the Court in Totes does minimize the reliance. The only legal restriction actually provided in the tariff is Legal Note 2. (A) (a) which excludes "Bags made of sheeting of plastics, whether or not printed, with handles, not designed for prolonged use (Heading 3923)". The Legal Note is directed toward bags which have handles, are of a kind classified within Heading 3923 as discussed in the citations above, and are "* * * *not designed for prolonged use*", (emphasis added).

There is no evidence of a commercial interpretation, Congressional intent or other tariff definition as to the meaning of "prolonged" as it appears. Nor is there any indication in the tariff that the term is to be applied to bags other than those of the kind classified in Heading 3923 which are bags not designed for personal use after the stream of commerce.

Customs has previous utilized the standards for quality assurance as provided in American Society for Testing Materials (ASTM) 1593–81, Table 1, type 1 (calendared sheeting of 90 percent vinyl chloride). It is noted that the Table 1 has a quality standard for both sheeting found to be over and under 3 mil in thickness. The thickness is only part of the methodology in determining the ASTM quality requirement. The ASTM methodology for determining thickness is prescribed in ASTM D1593, Test method 9.1.3 of the 1981 edition of ASTM and as published in the 1992 edition as Test Method 10.1.3. The ASTM notes that the exact method must be used for embossed sheeting. There is no other known commercial standard and there is not indication that the standard is widely utilized.

Customs decision 955470, February 17, 1994, classified garment bags of substantially the same construction as now submitted within subheading 4202.92, HTSUSA. The articles were found to satisfy the requirements of ASTM 1593, Table 1, based on an ASTM thickness of 3 mil.

A recent Court of International Trade (CIT) decision has limited the use of the ASTM. *Central Products Co. v. United States*, Slip Op. 96–112, as published in the CUSTOMS BULLETIN, Vol. 30, No. 33, August 14, 1996, notes that the definition of a term as it appears in the tariff be taken according to the common or commercial definition and if the commercial definition is not general, definite and uniform, the common definition must prevail. If the commercial definition is embodied in the ASTM there must be an indication that it was the intent of Congress to use that definition or standard. The court ruled that the common definition must prevail if no other indication is present. The use of the common definition of the word "rigid" prevailed in *Central* as well as it did in a similar decision involving Heading 4202, *Amity Leather company and Luggage and Leather Goods Manufacturers of America, v. United States, colony one Trading Corp.*, Slip Op. 96–140. This office knows of no commercial definition, nor evidence of intent, of the word "Prolonged" as it appears in the Legal Note.

All common definitions of the term "prolong" is to lengthen in time, to extend the duration, or to continue. Styles SB 0021, SY 3, SCP–1 and 04730 are given to the purchasers after the point of purchase and do become the personal effect in themselves. The bags are designed for continued use both in the home and when traveling. As noted the purpose of the imprint is to continue to keep the name in the public eye. The samples speak for themselves in that they are clearly designed for continued use after the point of purchase and will continue to be used to carry the garments.

The samples presented are of a kind similar to the containers, cases and bags of Heading 4202, HTSUSA. The applicable subheading for styles 04730, SCP1, SBP0021 and SY3, garment bags of a sheeting of plastics, will be 4202.92.4500, HTSUSA, which provides, in part, for travel, sport and similar, bags, with outer surface of a sheeting of plastics. The rate of duty will be 20 percent *ad valorem*.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Kevin Gorman at 212–466–5893.

PAUL K. SCHWARTZ,
Chief, Textiles & Plastics Branch,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:TE 960411 CAB
Category: Classification
Tariff No. 3923.90.00

AMY J. JOHANNESEN, ESQ.
SIEGEL, MANDELL & DAVIDSON, P.C.
One Astor Plaza
1515 Broadway
43rd Floor
New York, NY 10036–8901

Re: Classification of a garment bag, Heading 3923; Heading 4202.

DEAR MS. JOHANNESEN:

This is in response to a request for reconsideration of New York Ruling (NY) A86324, dated February 14, 1997, on behalf of your client I. Shamah & Sons, Inc. The request was for a tariff classification ruling pursuant to the Harmonize Tariff Schedule of the United States Annotated (HTSUSA). A sample was submitted to New York Customs. After further review of NY A86234, Customs Headquarters is of the opinion that it is in error and should be revoked.

Facts:

The samples at issue are various styles of garment bags. Style No. 04730 is comprised of black embossed vinyl material containing the "Nordstrom" logo with gold vinyl trim. The vinyl averages 2.66 mils in thickness. The article contains a top opening through which a hanger may be placed, a front opening with a zipper closure, and gussets at the side. The edges of the bag are sewn together. Style No. SCP1 is made up of red embossed vinyl featuring the "Shirt Corner Plus" logo and red vinyl trim. The bag contains a top opening through which a hanger may be placed and a front opening with zipper closure. The average thickness of the vinyl composing this bag is 3.08 mils. Style No. SY3 is composed of blue embossed vinyl featuring blue vinyl trim. The bag contains a top opening through which a hanger may be placed and a front opening with zipper closure. The vinyl of which this style is made of averages 3.71 mils in thickness. Style No. SBP0021 is comprised of embossed vinyl featuring the "Neiman Marcus" logo and gray trim. This bag contains a top opening through which a hanger may be placed and a front opening with a zipper closure. The vinyl for this style averages 3.64 mils in thickness.

Each bag also contains a clear plastic window for placement of an identification tag for purchases held for pickup or delivery to a specific consumer. These bags are sold to retail stores for distribution to consumers to carry home purchase after the point of sale.

In NY A86234, Customs classified the subject bags in subheading 4202.92.45, HTSUSA, which is the provision for travel bags with an outer surface of plastic sheeting materials. You assert that the subject bags are properly classifiable in subheading 3923.90.00, HTSUSA, the provision for articles for the conveyance or packing of goods, of plastics.

For the purposes of determining the proper tariff classification for bags embossed of plastic sheeting, pursuant to the American Society for Testing Materials (ASTM) D 1593, Customs tested each bag twice to determine the thickness of the vinyl comprising the bags. In both instances, the vinyl making up each bag tested below 4 mils in thickness. Independent

laboratory test results were also submitted to Customs which concluded that the thickness of the vinyl comprising the bags was below 4 mils.

Issue:

Whether the subject bags are classifiable in subheading 3923.90.00, HTSUSA, or subheading 4202.92.45, HTSUSA?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's, taken in order.

The subject bags are potentially classifiable under two different headings. Heading 4202, HTSUSA, which provides for inter alia suitcases, traveling bags, and similar containers. Heading 3923, HTSUSA, provides for other articles for the conveyance or packing of goods of plastics.

Previously, Customs has classified garment bags that are constructed of 4 mils or thicker vinyl under Heading 4202, HTSUSA, as luggage. Usually, bags comprised of vinyl more than 4 mils in thickness denotes an article that has a durable construction and is designed for prolonged use and travel. Generally, garment bags that are comprised of vinyl less than 4 mils in thickness indicates a flimsy bag which is not designed for repetitive use. These bags have been classified under Heading 3923, HTSUSA, the provision for articles used for the conveyance and packing of goods.

In determining the thickness of garment bags, Customs has consistently used the formula for determining the gauge of embossed non-rigid vinyl chloride film as recommended by ASTM D 1593. *See,* Headquarters Ruling Letter (HQ) 955470, dated February 17, 1994; HQ 085559, dated April 13, 1990; HQ 083612, dated May 15, 1989. In this case, Customs Laboratory Report No. 2–96–11215–004, dated December 4, 1996, and Customs Laboratory Report No. 3–96–50579–004, dated November 21, 1996, and Customs Laboratory Report No. 3–97–10205–001, dated January 24, 1997, all concluded that the thickness of the vinyl comprising the subject garments bags was below 4 mils. Moreover, an independent laboratory, SGS U.S. Testing Company, Inc. performed test ASTM D 1593 on the subject garment bags on July 25, 1996, and also arrived at findings consistent with the Customs laboratory conclusions.

You assert that the instant garment bags are designed, like a shopping bag, for consumers to use to protect their purchases during conveyance from the store to the home. You also state that the subject bags are neither designed nor marketed for prolonged use. Finally, you contend that the vinyl would not withstand repeated uses without tearing due to its thin construction.

In light of prior rulings which classified garment bags comprised of vinyl measuring less than 4 mils in thickness under Heading 3923, HTSUSA, the laboratory reports which concluded that the subject garment bags are comprised of vinyl less than 4 mils in thickness, and the fact that the bags are not designed for prolonged, repetitive use, it is clear that they are properly classifiable under Heading 3923, HTSUSA.

Holding:

Based on the foregoing, Style Nos. 04730, SCP1, SY3, and SBP0021 are classifiable in subheading 3923.90.00, HTSUSA, the provision for articles for the conveyance or packing of goods, of plastics; sacks and bags; of other plastics. The applicable General rate of duty is 3 percent *ad valorem*.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification), and the restraint (quota/visa) categories, you should contact your local Customs office prior to importing the merchandise to determine the current applicability of any import restraint requirements.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 101

ABOLISHMENT OF BOCA GRANDE AS A PORT OF ENTRY

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes the abolishment of the port of entry of Boca Grande, Florida, in order to obtain more efficient use of its personnel, facilities and resources and to provide better service to carriers, importers and the general public.

DATES: Comments must be received on or before September 12, 1997.

ADDRESSES: Written comments (preferably in triplicate) may be addressed to the Regulations Branch, Office of Regulations and Rulings, U. S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229. Comments submitted may be inspected at the Regulations Branch, Office of Regulations and Rulings, 1099 14th Street, NW. Suite 4000, Washington, D.C., on regular business days between the hours of 9:00 a.m. and 4:30 p.m.

FOR FURTHER INFORMATION CONTACT: Harry Denning, Office of Field Operations, 202–927–0196.

SUPPLEMENTARY INFORMATION:

BACKGROUND

As part of a continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the general public, Customs is proposing to amend § 101.3(b)(1), Customs Regulations (19 CFR 101.3(b)(1)), by abolishing the port of entry of Boca Grande, Florida.

Customs wishes to eliminate the port so that Customs can make more efficient use of its personnel, facilities and resources. There is not sufficient activity at the port to maintain the facility, and there are other nearby active ports of entry such as Sarasota and Tampa which are available to handle any Customs transactions in that geographical area.

If the abolishment of Boca Grande is adopted, the list of Customs ports in 19 CFR 101.3(b)(1) will be amended accordingly.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, 1099 14th St. NW., Suite 4000, Washington, D.C. 20005.

AUTHORITY

This change is proposed under the authority of 5 U.S.C. 301 and 19 U.S.C. 2, 66 and 1624.

REGULATORY FLEXIBILITY ACT

Customs establishes, expands, and consolidates Customs ports of entry throughout the United States to accommodate the volume of Customs-related activity in various parts of the country. Although this document is being issued with notice for public comment, it is not subject to the notice and public procedure requirements of 5 U.S.C. 553 because it relates to agency management and organization. Accordingly, this document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

EXECUTIVE ORDER 12866

Because this document relates to agency organization and management, it is not subject to E.O. 12866.

DRAFTING INFORMATION

The principal author of this document was Janet L. Johnson, Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

SAMUEL H. BANKS,
Acting Commissioner of Customs.

Approved: May 13, 1997.

JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, July 14, 1997 (62 FR 37526)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
R. Kenton Musgrave
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Dominick L. DiCarlo

Nicholas Tsoucalas

Clerk

Raymond F. Burghardt

Decisions of the United States Court of International Trade

(Slip Op 97–85)

TIMEX V.I., INC. PLAINTIFF *v.* UNITED STATES OF AMERICA, WILLIAM DALEY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF COMMERCE, BRUCE BABBITT AS SECRETARY OF THE UNITED STATES DEPARTMENT OF INTERIOR AND FRANK W. CREEL AS DIRECTOR, STATUTORY IMPORT PROGRAMS STAFF, IMPORT ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, DEFENDANTS

Court No. 96–02–00528

[Plaintiff's motion for judgment upon the agency record denied.]

(Dated June 30, 1997)

Timex Corporation *(Frank T. Judge III)* for plaintiff.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *(Velta A. Melnbrencis)* and *Robert E. Nielsen,* Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for defendants.

MEMORANDUM OPINION

DICARLO, *Senior Judge:* This case involves plaintiff Timex V.I., Inc.'s challenge to a decision issued by the Secretaries of Commerce and of the Interior. (Secretaries' Decision of Jan. 25, 1996, Pub. Doc. 13.) The Secretaries affirmed a decision by the Director of the Statutory Import Programs Staff, Department of Commerce denying Timex a production incentive certificate (PIC) for 1996, because Timex planned to close its watch facility in the Virgin Islands by the end of 1995 and would not be continuing watch assembly in the Virgin Islands in 1996. Timex contends the Secretaries' administrative decision unlawfully denied Timex of its PIC.

BACKGROUND

Plaintiff Timex V.I., Inc. is a wholly-owned subsidiary of Timex Corporation that began watch assembly operations in the Virgin Islands in 1986. Timex V.I. at various times employed up to 120 people and as-

sembled up to 700,000 watches annually. In response to changing market conditions, however, Timex determined that its Virgin Islands assembly operations were no longer economically viable. In July of 1995, plaintiff informed the Director of Statutory Import Programs Staff, International Trade Administration, Department of Commerce, that its Virgin Islands facility would be closed by the end of 1995. In August 1995, the Director requested a written statement describing Timex's shutdown plans before a decision would be made regarding Timex's eligibility for a PIC in 1996. Timex provided the requested information in a September 7, 1995 letter.

Paragraph (h)(i) of Note 5 of the additional U.S. notes to Chapter 91 of the Harmonized Tariff Schedules of the United States (HTSUS), as amended, provides for the issuance of PICs. It reads:

> (i) In the case of each calendar year beginning after December 31, 1982, and before January 1, 2007, the Secretaries, acting jointly, shall—
>
> > (A) verify the wages paid by each producer to permanent residents of the insular possessions during the preceding calendar year; and
> >
> > (B) issue to each producer (not later than March 1 of such year) a certificate for the applicable amount.

HTSUS, § XVIII, ch. 91, Additional Note 5, para. (h)(i) (Supp. I 1995); *see also* Uruguay Round Agreements Act, Pub. L. No. 103–465, § 602(a), 108 Stat. 4809, 4991 (1994). The parties to this litigation have referred to this provision as "Section 110(h)(i)." For the sake of consistency, the court will do the same.

A production incentive certificate provides for a duty refund on the import of dutiable watches from countries other than U.S. insular possessions. HTSUS, § XVIII, ch. 91, Additional Note 5, paras. (h)(i), (h)(v) (Supp. I 1995). The dollar value of each certificate is calculated from the creditable wages and duty-free shipments made by each insular possessions producer during the previous calendar year. Because the watches and watch movements produced in the Virgin Islands already receive duty-free treatment, the certificate is negotiable and may be transferred to another company which has made duty-paid entries into the United States.

In a letter dated September 27, 1995, the Director explained that Timex was not eligible to receive a PIC in 1996, because it was closing operations by the end of 1995. (Letter from Director of SIPS, Pub. Doc. No. 11.) Pursuant to 15 C.F.R. § 303.13(a) (1995), Timex filed an appeal of the Director's decision with the Secretaries of Commerce and the Interior. (Letter appealing denial of PIC, Pub. Doc. No. 12.) The Secretaries affirmed the Director's decision denying the issuance of the PIC. Timex filed this action contesting that decision. Jurisdiction is proper under 28 U.S.C. § 1581(i) (1994).

DISCUSSION

Timex argues "that the plain language of [Section 110(h)(i)] simply directs the Secretaries to *verify* the wages paid by Timex to its employees in the Virgin Islands in 1995 and to *issue* to Timex not later than March 1, 1996 a certificate for the applicable amount." (Pl.'s Mot. for J. Upon Agency R. at 8.) Timex claims the Secretaries are given no discretion under the statutory provision, and that once wages are verified, a PIC must be given. Plaintiff contends that the prerequisite established by the Secretaries—that the recipient firm must actually be a watch producer in the year the PIC is issued—creates a substantive burden that Congress did not envision and for which the statute does not provide. The court disagrees.

Section 110(h)(i) provides, in relevant part, that the Secretaries shall "issue to each *producer* * * * a [PIC] for the applicable amount." HTSUS, § XVIII, ch. 91, Additional Note 5, para. (h)(i)(B) (Supp. I 1995) (emphasis added). In reviewing the Secretaries' construction of the statute, the court must first consider "whether Congress has directly spoken to the precise question at issue." *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). The statute does not define the term "producer," and does not speak directly to the question as to whether a potential PIC recipient must be a current producer in the year in which the PIC is actually issued. In such a situation, "the court does not simply impose its own construction on the statute; * * * the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. "To survive judicial scrutiny, an agency's construction need not be the *only* reasonable interpretation or even the *most* reasonable interpretation. Rather, a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another." *Koyo Seiko Co., Ltd. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (citation omitted).

When Congress leaves a gap for an agency to fill, an administrative agency is empowered to "elucidate a specific provision of the statute by regulation." *Chevron*, 467 U.S. at 843–44. The HTSUS grants the Secretaries the authority to issue various regulations. It reads, in relevant part: "(ij) the Secretaries are authorized to issue such regulations, not inconsistent with the provisions of this note, as they determine necessary to carry out their respective duties under this note. Such regulations shall include minimum assembly requirements." HTSUS, § XVIII, ch. 91, Additional Note 5, para. (ij) (Supp. I 1995). In reviewing such regulations, the court is further guided by the principle that an agency's "interpretation of its own regulations implementing 'the statutes it administers' is entitled to 'substantial weight.'" *Asociacion Colombiana de Exportadores de Flores v. United States*, 903 F.2d 1555, 1559 (Fed. Cir. 1990) (quoting *Floral Trade Council v. United States*, 888 F.2d 1366, 1368 (Fed. Cir. 1989)). "When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order. '[T]he administrative interpretation * * * be-

comes * * * controlling * * * unless it is plainly erroneous or inconsistent with the regulation.'" *Id.* at 1559–60 (quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965)).

The relevant implementing regulations define "producer" as "[A] duty-exemption holder which has maintained its eligibility for further allocations by complying with these regulations." 15 C.F.R. § 303.2(6) (1995). The term "duty-exemption" is defined as "the authorization of duty-free entry of a specified number of watches and watch movements into the Customs Territory of the United States." 15 C.F.R. § 303.2(9) (1995). Therefore, a producer is, pursuant to the regulations just described, a duty-exemption holder presently authorized to import a specified number of watches and watch movements duty-free into the U.S., which has complied with all regulations, including completion of an application for an annual allocation. The Secretaries have thus interpreted the regulatory definition of the term "producer" to mean a producer in the year for which the production incentive certificate applies.

Indeed, the very first implementing regulation of Section 110(h)(i) issued in 1983 specifically provided that:

> Certificates * * * shall be issued as soon as possible after February 1, 1983 * * * upon receipt of the producer's certification that it intends and shall be able to sustain operations beyond calendar year 1983.

15 C.F.R. pt. 303, app. § 11(b)(1) (1984). In other words, the first regulations implementing Section 110(h)(i) specifically required that potential PIC recipients demonstrate continued operational viability. However, it must be noted that in 1985, the Secretaries eliminated the requirement that watch producers submit certifications that they would sustain operations beyond the calendar year in which the PIC was to be issued. As the Secretaries explained:

> Section 303.12(a)(1) requires producers to certify that they intend and shall be able to continue operations beyond the current calendar year prior to issuance of their production incentive certificates. When we adopted this requirement in 1983 we were concerned that producers might use the certificates but nevertheless cease operations, i.e., take advantage of the incentive without fulfilling its purpose. In our judgment, the additional incentives have been effective and there is no longer any reason for this transitional safeguard.

Proposed Rule, Watch Duty-Exemption Program, 50 Fed. Reg. 29,232, 29,232 (1985).

Although the administrative procedure of filing a certificate stating that production would be continued was eliminated in 1985, the Secretaries have nevertheless interpreted subsequent regulations as retaining the substantive requirement that the potential PIC recipient must remain a producer in the year in which the PIC is to be issued. (Secretaries' Decision of Jan. 25, 1996, Pub. Doc. 13, at 3–4.) The Secretaries argued the legislative history of the PIC legislation reveals that the in-

centive mechanisms were intended to encourage companies to continue their Virgin Islands operations. The Secretaries further argue their requirement that a company only be issued a PIC in a particular year if it intends to continue operating in that year is consistent with this legislative history. *Id.* at 4–6 (quoting *Miscellaneous Tariff and Trade Bills: Hearings Before the Subcommittee on Trade of the House Committee on Ways and Means*, 97th Cong. 45 (1982) (statement of Honorable Ron de Lugo, Congr. Rep. V.I.) (noting "[t]o provide the necessary stimulus to produce quartz analog watches in the Virgin Islands, my bill would cause the issuance to territorial assemblers of [PICs]. * * *") and H.R. Rep. No. 97–837, at 38 (1982) (noting the PIC legislation is "designed to encourage production of watches in the insular possessions of the United States")).

CONCLUSION

Given the relevant standard of review, the court finds that the Secretaries' statutory and regulatory interpretation of the term "producer" is reasonable. The decision to deny Timex a PIC logically follows from the Secretaries' enforcement of their regulations. Timex ceased operations by the end of 1995. Therefore, as it was no longer producing in the insular possession in 1996, Timex did not maintain its eligibility for a duty-exemption allocation in 1996. Timex thus did not qualify as a producer entitled to a PIC in 1996. The Secretaries decision to affirm the Director's denial of Timex' request for a PIC will therefore be sustained.

(Slip Op. 97–86)

TIKAL DISTRIBUTING CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 95–11–01415

[Defendant's motion to dismiss granted.]

(Decided July 2, 1997)

Peter S. Herrick, counsel for Plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office; *Barbara M. Epstein,* Civil Division, Dept. of Justice, Commercial Litigation Branch, of counsel, for Defendant.

OPINION

POGUE, *Judge:* Plaintiff, Tikal Distributing Corp. (Tikal), an importer of leather shoes, brings this action to recover moneys tendered to the United States Customs Service (Customs).

BACKGROUND

By letter dated December 20, 1991, Tikal voluntarily disclosed to Customs that second invoices or "notes" to Tikal from its supplier had ac-

companied its commercial invoices dating from June 1982. Unlike the commercial invoices, the "notes" were not filed with entries of the merchandise. The second invoices included charges for exclusive selling rights and other charges, which Tikal referred to as "addition[s] to dutiable value." (Letter of Peter S. Herrick, Dec. 20, 1991 (Def.'s Ex. B) [hereinafter Disclosure Letter] at 5). Tikal now asserts that neither the exclusive rights payments, which ranged over time from 1% to 20 % of the value of the imported merchandise, or the "addition[s] to dutiable value" are dutiable. (Complaint at ¶¶ 45–47 ("The 'notes' issued by the supplier included amounts for the 'rights' and for financial services * * *. The payments for financial services are not dutiable * * *. The payments for 'exclusive rights of sale' are not dutiable * * *.")).

Included with Tikal's disclosure letter was a payment of $25,273.00, which represented duties on the money paid other than the exclusive rights payments. Disclosure Letter at 9. In the letter Tikal "reserve[d] the right to seek the refund of these duties if appropriate," and said that "if necessary this letter may be considered a protest * * *." *Id.* at 6. By its own terms, the letter was a "prior disclosure" filed pursuant to 19 U.S.C. § 1592(c)(4)(1988).[1] On all entries filed subsequent to the Disclosure Letter, Plaintiff submitted the "notes" to Customs with the entry papers, but Tikal did not pay duties on the amounts charged in these second invoices. (Compl. at ¶ 8).

After receiving the letter, Customs instituted an investigation of the second invoicing. In September 1994, as a result of the investigation, Customs requested payment, pursuant to 19 U.S.C. §1592(d)(1988)[2] of an additional $72,426.41, which represented duties on the exclusive right to sell payments for entries made from October 1, 1989 to December 20, 1991. Customs also requested payment for all duties owed on entries filed after the 1991 disclosure for exclusive rights payments and any other undervaluations, and stated that "[a]ll new entries filed with Customs * * * must include in the entered value additions for dutiable 'exclusive selling rights payments' (proceeds) and any other missing additions to value." (Letter from U.S. Customs Service to Tikal, Sept. 18, 1994 (Pl.'s Ex. A)).

On Nov. 3, 1994, Tikal sent Customs $56,185.92 in duties for additional payments made by Tikal to its supplier from 1991 to 1994. Again, Tikal excluded from the money paid to Customs duties on all exclusive rights payments. (Letter from Peter S. Herrick to U.S. Customs Service,

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[1] 19 U.S.C. §1592(c)(4)(1988) provides:

Prior disclosure

If the person concerned discloses the circumstances of a violation * * * before, or without knowledge of, the commencement of a formal investigation of such violation, with respect to such violation, merchandise shall not be seized and any monetary penalty to be assessed * * * shall not exceed * * * the interest * * * on the amount of lawful duties of which the United States is or may be deprived so long as such person tenders the unpaid amount of the lawful duties at the time of disclosure or within 30 days * * * after notice by the appropriate customs officer of his calculation of such unpaid amount.

[2] Under 19 U.S.C. §1592(d)(1988), "[I]f the United States has been deprived of lawful duties as a result of subsection (a) of this section, the appropriate customs officer shall require that such lawful duties be restored, whether or not a monetary penalty is assessed." Subsection (a) forbids any person, "by fraud, gross negligence, or negligence," from entering any merchandise "into the Commerce of the United States," through any document, oral statement or act which is material and false, or any omission which is material. 19 U.S.C. § 1592(a)(1988).

Nov. 3, 1994 (Def.'s Ex. C)). Tikal contended that the exclusive rights payments were non-dutiable, and reserved the right to file a protest for the return of all or part of its payment to Customs. *Id.* at 8.

Tikal met with a Customs representative on November 22, 1994 to discuss the dutiability of the exclusive rights payments. At that meeting, according to a letter sent by Tikal's counsel to Customs on December 2, 1994, Customs calculated that Tikal owed a total of $131,240.74 in duties on the exclusive rights payments made to its supplier. Tikal proposed to pay the money at the rate of $5,000 per month. (Letter from Peter S. Herrick to U.S. Customs Service, Dec. 2, 1994) (Pl.'s Ex. C). The first $5,000 payment was included with the letter, as was an additional $4,182.93, representing the duties owed on additional non-exclusive rights payments made on entries of September and October, 1994. *Id.* The letter also informed Customs that "[s]ince Customs has taken the position that all of the note payments are dutiable, Tikal will be protesting this decision."

Plaintiff made entries of merchandise on July 27, 1994; Dec. 5, 1994; Dec. 20, 1994; and Feb. 14, 1995. All four entries were liquidated between April and July, 1995. Plaintiff filed a protest for each liquidation. It is these protests that are the subject of this action. On each of its protests, Plaintiff wrote:

> Protest is made of the Customs decision to make payments from the importer to Calzado Coban to be dutiable as the proceeds of resale under 19 U.S.C. §1401a(b)(1)(E). The importer seeks the refund of the duty payment of $25,273.00 made to Customs on December 20, 1991. The importer seeks the refund of the duty payment of $56,185.92 paid to Customs on November 3, 1994. The importer seeks the refund of all of the $5,000.00 in additional duty payments required by Customs to be paid by the importer. The importer protests the inclusion of "exclusive selling rights payments" in the entered values for all entries filed subsequent to December 20, 1994.

(Def.'s Ex. D). According to Customs, no duties were charged on the exclusive rights payments for the four entries in this action. (Def.'s Mot. Dismiss Failure State Claim and Lack of Jurisdiction at 4). "With respect to the four entries covered by this action, the liquidated dutiable value was only based on the price set forth on the commercial invoices, * * *." *Id.* at 4–5. Furthermore, Customs claims, "Customs has not applied any part of Tikal's voluntary tender payments to entries in this action; * * *." *Id.* at 6 (citation omitted). For that reason Customs argues the case should be dismissed for failure to state a claim on which relief may be granted.

Tikal argues that this Court has jurisdiction under 28 U.S.C. § 1581(a)(1988), which gives the Court jurisdiction over actions contesting the denial of a protest. Tikal argues the entries covered by Tikal's protests were the first entries liquidated after Customs' response to Tikal's disclosure. "Not knowing to which entries Customs was to credit the payments, Tikal protested the first entries that were liquidated." (Pl.'s Opp'n. to Def.'s Mot. to Dismiss at 4).

Tikal also argues, in the alternative, that if the Court finds that the additional duties were not applied to the protested entries, then its letters of December 20, 1991 and December 2, 1994 should be considered protests of Customs' refusal to refund the moneys tendered by Tikal and that the Court has jurisdiction over these protests pursuant to 28 U.S.C. § 1581(a) or (i)(2) & (4). *Id.* at 5.

Finally, Tikal argues that if the Court does not have jurisdiction under § 1581(a) or (i), then the Court should transfer the case to the Federal Claims Court, pursuant to 28 U.S.C. § 1631 and § 1491. *Id.* at 5–6.

DISCUSSION

I. The Four Protested Entries

Customs has provided the Court with a declaration by Jay Baltuch, an Import Specialist at the Port of Miami, Florida who reviewed the protests involved in this court action. In his declaration, Baltuch swears that the appraisement and liquidation of the four entries was based on the invoice prices and did not include any value additions by Customs for the exclusive right to sell, and that the Plaintiff's prior tenders do not relate to these entries. Mr. Baltuch's declaration is supported by Customs' entry forms which show that the appraisement of Tikal's entries was based on the value of the merchandise as reported by Tikal.

Tikal has not provided the Court with any evidence to rebut either Mr. Baltuch's statement or the information on the entry forms. "If allegations of jurisdictional facts by the party who seeks the exercise of jurisdiction in his favor are challenged by his adversary in any appropriate manner, he must support them by competent proof." *Schering Corp. v. United States*, 67 CCPA 83, 88, 626 F.2d 162, 167 (1980)(citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 56 S. Ct. 780 (1936)). In other words, it is the party seeking jurisdiction who has "the burden of showing that he is properly in court." *McNutt*, 298 U.S. at 189, 56 S. Ct. at 785. Plaintiff has failed to meet this burden. Therefore, the Court must conclude that Customs did not charge duties on Plaintiff's exclusive rights payments for these four entries, and with regard to these entries, Plaintiff has failed to state a claim upon which relief may be granted.

II. Plaintiff's December 20, 1991 Payment

Plaintiff argues that this Court has jurisdiction pursuant to 28 U.S.C. § 1581(a)[3] over its claim for a refund of the $25,273 it sent to Customs on December 20, 1991. Plaintiff asserts that the letters sent to Customs on December 20, 1991 and December 2, 1994 constituted protests of Customs' decision not to refund the money and that section 1581(a) gives this court jurisdiction over Customs' denial of those protests. The Court does not agree.

Section 1581(a) provides no jurisdiction for protests outside of the exclusive categories listed in 19 U.S.C. § 1514(a). *See Mitsubishi Elec. Am.*,

[3] 28 U.S.C. § 1581(a) provides: "The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930."

Inc. v. United States, 44 F.3d 973, 976 (Fed. Cir. 1994). The decisions subject to protest under section 1514(a) include inter alia:

> (1) the appraised value of merchandise;
>
> (2) the classification and rate and amount of duties chargeable;
>
> (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury; * * *.

The refusal to refund a voluntary tender is not a charge or exaction under 19 U.S.C. § 1514(a)(3), nor does such a decision fall into any of the other categories of protest listed in section 1514. *See, e.g. Carlingswitch, Inc. v. United States*, 85 Cust. Ct. 63, 500 F. Supp. 223 (1980), *aff'd* 68 CCPA 49, C.A.D. 1264, 651 F.2d 768 (1981) [*Carlingswitch I*]. In *Carlingswitch I*, the plaintiff voluntarily tendered $91,992.35 to Customs on its own initiative in order to limit its potential penalty liability. Subsequently, Customs demanded payment of $7,926,778 from plaintiff as forfeiture value on the basis of plaintiff's undervaluation of its merchandise, false freight figures and failure to report true constructed value figures. In response, plaintiff filed a petition for remission or mitigation of the claim. Eighteen months later, Customs notified plaintiff that the statute of limitations had run on all entries and that the forfeiture claim was remitted in its entirety.

Plaintiff then requested a refund of its initial deposit. The request was denied. Plaintiff filed a protest against the denial which was also denied. When plaintiff filed suit, the court held that Customs' refusal to refund money voluntarily tendered "without legal obligation or compulsion," could not constitute an "exaction" under 19 U.S.C. § 1514(a)(3) and that Customs' refusal to refund the money was not a protestable decision. *See* 85 Cust. Ct. at 66, 500 F. Supp. at 227. For that reason, the court decided it did not have jurisdiction over plaintiff's claim. *See id.* at 66–67, 500 F. Supp. at 227.

Similarly, the money tendered by Tikal in 1991 was tendered voluntarily by Plaintiff "on its own initiative and without request or demand by Customs." *Id.* at 65, 500 F. Supp. at 226. More specifically, the money was filed pursuant to the requirements of 19 U.S.C. § 1592(c)(4) in order to limit Tikal's potential penalty liability. *See* Disclosure Letter at 6 ("In this disclosure we are paying additional duties * * *. We are doing this as an act of good faith and because of the statutory requirements of a voluntary disclosure.") "[T]o constitute an 'exaction' under section 514(a)(3), there would have had to have been some compulsion on the part of Customs requiring plaintiff to have paid the monies." *Carlingswitch I*, 85 Cust. Ct. at 66, 500 F. Supp. at 227.

Plaintiff tendered money to Customs to qualify for voluntary disclosure treatment and limit its potential penalty liability. Tikal did so without any legal obligation or compulsion. Customs' refusal to refund that

money is not a protestable decision. Absent a valid protest, this Court does not have jurisdiction pursuant to 28 U.S.C. § 1581(a).[4]

Plaintiff also argues that if the Court does not have jurisdiction under section 1581(a), then it must have jurisdiction under 28 U.S.C. § 1581(i)(1988).[5] The Court does not agree. In *Carlingswitch, Inc. v. United States*, 5 CIT 70, 560 F. Supp. 46 (1983) [*Carlingswitch II*], the plaintiff from *Carlingswitch I* again sought to recover money it had tendered voluntarily during a penalty investigation. The facts were identical to those in *Carlingswitch I*. The plaintiff argued that § 1581(i) could be used "to fashion a cause of action in the absence of a statute expressly conferring one on plaintiff." Citing *Montgomery Ward & Co. v. Zenith Radio Corp.*, 69 CCPA 96, 673 F.2d 1254 (1982), the court rejected plaintiff's argument: "[N]ew causes of action cannot be created under 28 U.S.C. §1581(i)." 5 CIT at 72, 560 F. Supp. at 48.

This Court does not have jurisdiction over Plaintiff's claim for a refund of the moneys tendered in December, 1991 under 28 U.S.C. § 1581(a) or (i). Therefore, with respect to this money, Plaintiff's claim must be dismissed. This result is consistent with the structure of the statutory scheme governing Customs' penalty actions. Section 1592 gives Customs the authority to impose penalties upon any person who enters merchandise into the United States "by fraud, gross negligence, or negligence * * *" 19 U.S.C. § 1592(a)(1). That section also contains the voluntary disclosure provision which allows a person to disclose the circumstances of a violation of subsection (a) "before, or without knowledge of, the commencement of a formal investigation * * *" and thereby limit any potential penalty liability. 19 U.S.C. § 1592(c)(4). Judicial review of Customs' actions under section 1592 is provided for in 28 U.S.C. § 1582, which gives the Court of International Trade "exclusive jurisdiction of any civil action * * * *which is commenced by the United States* * * * to recover a civil penalty under [19 U.S.C. § 1592] * * *" (emphasis added). There is no provision for importer-initiated suits arising out of section 1592. Even without such a provision, the statute does provide a complete judicial remedy for those who believe that Customs has wrongfully assessed a penalty. Specifically, the statute allows a party to obtain de novo review of a government claim from the Court of International Trade before paying any penalty. *See* 19 U.S.C. § 1592(e)("Notwithstanding any other provision of law, in any proceeding commenced *by the*

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[4] In *Pentax Corp. v. Robison*, 924 F. Supp. 193 (CIT 1996), *appeal docketed*, No. 96-1320 (Fed. Cir. April 23, 1996), the court found it had jurisdiction over "all issues relating to 'prior disclosure.'" 924 F. Supp. at 196. However, that was in the context of an action consolidated with an enforcement action brought by the government to collect a penalty assessment.

[5] 28 U.S.C. § 1581(i) provides:

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section * * * the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers that arises out of any law of the United States providing for—

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section * * *

United States in the Court of International Trade for the recovery of any monetary penalty claimed under this section—(1) all issues, including the amount of the penalty, shall be tried de novo; * * *")(emphasis added).

Finally, Plaintiff argues that if this Court decides that it does not have jurisdiction over this case, then it should transfer the case to the Court of Federal Claims pursuant to 28 U.S.C. § 1631, which provides that if a "court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action * * * to any other such court in which the action * * * could have been brought at the time it was filed * * *." It is not apparent to the Court, however, based on the record, that any other court would have jurisdiction over this cause of action.

Plaintiff contends that the U.S. Court of Federal Claims has jurisdiction pursuant to 28 U.S.C. § 1491[6] (Tucker Act) "because it is a civil action; against the United States; * * * and, founded upon an Act of Congress—section 1592 of the Tariff Act of 1930." (Pl.'s Opp'n Def.'s Mot. Dismiss Failure State Claim and Lack Jurisdiction at 6).

In support of its position, Plaintiff cites *Trayco, Inc.* v. *United States*, 994 F. 2d 832 (Fed. Cir. 1993). In *Trayco*, the Court of Appeals for the Federal Circuit held that a district court had properly exercised jurisdiction over an importer's suit for the refund of penalties pursuant to 28 U.S.C. § 1346(a)(2) (Little Tucker Act).[7] *Id.* at 837. The court stated:

> Meeting the jurisdictional requirements of section 1346(a)(2) * * * is not enough for Trayco to succeed in having its case heard in federal district court. "[T]he Tucker Act * * * is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages. * * * [T]he Act merely confers jurisdiction * * * whenever [a] substantive right exists." * * * Thus, Trayco must assert a "substantive right enforceable against the United States for money damages."

Id. (quoting *United States v. Testan*, 424 U.S. 392, 398, 96 S. Ct. 948, 953 (1976)). The Trayco court then held that "[t]he refund of a penalty improperly exacted pursuant to an Act of Congress is a substantive right for money damages. *Id.* (citing *Eastport Steamship Corp. v. United States*, 372 F.2d 1002, 178 Ct. Cl. 599, 605 (1967)).[8]

This Court declines to extend *Trayco* by finding that the jurisdiction of the district courts also includes suits for the refund of duties voluntar-

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[6] 28 U.S.C. § 1491 provides:

> The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

[7] 28 U.S.C. § 1346 provides:

> (a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal claims, of:
>
> * * * * * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, * * *.

[8] For a discussion of the interplay between *Trayco* and the Court of International Trade's residual jurisdiction under 28 U.S.C. § 1581(i), see Patrick C. Reed, *The Role of Federal Courts in U.S. Customs & International Trade Law*, 195–98 (Oceana Publications, Inc. 1997).

ily tendered to avoid the imposition of penalties. As the Supreme Court stated in *United States v. Mitchell*, 463 U.S. 206, 103 S. Ct. 2961 (1983):

> Not every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act. The claim must be one for money damages against the United States, * * * and the claimant must demonstrate that the source of substantive law he relies upon "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained."

463 U.S. at 216, 103 S. Ct. at 2967–2968 (citing *United States v. Testan*, 424 U.S. at 400, 96 S. Ct. at 954)(other citations omitted). Plaintiff has failed to demonstrate that 19 U.S.C. § 1592 or any other statutory provision mandates compensation for damages resulting from a voluntary tender such as the one made by Plaintiff in this case.

Plaintiff also cites *United States v. Biehl & Co.*, 3 CIT 158, 539 F. Supp. 1218 (1982), for the proposition that if a gap exists in this Court's jurisdiction that gap must be addressed by another court. In *Biehl*, however, the government was attempting to recover tonnage duties upon the entry of a vessel. District courts had jurisdiction over such claims prior to the enactment of 28 U.S.C. § 1582 in 1980. The government, the plaintiff in *Biehl*, argued that section 1582 had transferred jurisdiction to the Court of International Trade. The Court, noting that tonnage duties are "separate and distinct" from duties on imported merchandise, found that jurisdiction continued to rest in the district court. *See* 3 CIT at 160, 539 F. Supp. at 1220. The *Biehl* court did not hold that in every action improperly brought in the Court of International Trade, a "gap" in jurisdiction exists, which requires transfer to another court. The difference between *Biehl* and the case now before the Court is that the *Biehl* court found that a cause of action existed, albeit outside the jurisdiction of the Court of International Trade because it did not involve import duties.

The present case *does* involve import duties. Therefore, it is similar to *Pentax Corp.* v. *Myhra*, 72 F.3d 708 (9th Cir. 1995)(amending 61 F.3d 731 (9th Cir. 1995)). In *Pentax*, the 9th Circuit upheld a determination of the District Court that it did not have jurisdiction over an action contesting Customs' determination that plaintiff must pay certain duties in order to qualify for prior disclosure status and avoid the imposition of a penalty. Because Pentax sought to avoid paying a duty, the Court said the action was within the exclusive jurisdiction of the CIT under section 1581. The court added, "[w]e express no opinion on * * * whether the CIT would have had original jurisdiction if Pentax had originally filed its complaint in that court." *Id.* at 709.

Based on the authority cited above, the Court does not believe that a district court or the Court of Claims would have jurisdiction over Tikal's cause of action. Therefore the Court will dismiss Tikal's cause of action with respect to the money tendered on December 20, 1991.

III. MONIES PAID AFTER SEPT. 1994

A portion of the monies paid by Plaintiff after receiving Customs' letter of September 1994, and after meeting with Customs representatives, is distinguishable from Tikal's initial tender. Tikal made its voluntary disclosure on Dec. 20, 1991. Any money tendered by Tikal that pertains to merchandise entered prior to that date should be considered to have been voluntarily tendered pursuant to section 1592(c)(4). For the reasons stated above, this Court does not have jurisdiction over Customs' refusal to refund such money.[9]

On the other hand, the merchandise entered after plaintiff's voluntary disclosure cannot be considered to be the subject of that disclosure. Therefore, any duties paid on such merchandise would not be considered a voluntary tender. Plaintiff informed Customs of all payments made to its supplier for merchandise entered after the disclosure letter, and paid estimated duties upon entry. Customs has now decided that additional duties are owed on these entries. Such a decision is protestable under 19 U.S.C. § 1514(a)(5), which permits the protest of "all orders and findings * * * as to * * *the liquidation or reliquidation of an entry, or any modification thereof; * * *."

Plaintiff's letters of November 3 and December 2, 1994 may be considered protests of Customs' decision. Under *Mattel, Inc. v. United States*, 72 Cust. Ct. 257, 260, 377 F. Supp. 955, 958–59 (1974):

> While no formal rules have been devised for the manner in which such objections should be expressed, the court has held letters to be sufficient as protests where they conveyed to the customs officials the objection in the mind of the protesting party so that the former would have an opportunity to review their decision and take action accordingly.

72 Cust. Ct. at 260, 377 F. Supp. at 958–59.

> [T]he court, taking a liberal posture, has held that, however cryptic, inartistic, or poorly drawn a communication may be, it is sufficient as a protest for purposes of section 514 if it conveys enough infor-

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[9] If Tikal disagreed with Customs' determination regarding duties owed on the exclusive rights payments made before the Prior Disclosure, it could have refused to pay the additional money requested by Customs, and foregone "prior disclosure" treatment. At that point, Customs may have assessed a penalty. *See* Letter from U.S. Customs Service to Jose M. Gutierrez, Sept. 18, 1994 ("[A]n omission resulting in substantial losses of revenue to U.S. Customs constitutes violations of 19 USC 1592 (a)(1)(A)(i) and (ii)"). If Tikal believed the penalty was assessed in error, it could have refused to pay and Customs would have commenced an enforcement action in the Court of International Trade pursuant to 28 U.S.C. § 1582 thus providing Tikal with the judicial review it now seeks. *See* 19 U.S.C. § 1592(e).

This result does not implicate the Constitutional due process issue raised "when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation * * *." *See Ex parte Young*, 209 U.S. 123, 147, 28 S. Ct. 441, 449 (1908). The penalties in *Young* were far more serious than those at issue in this case. Specifically, an act of disobedience was punishable by a fine not exceeding $5,000 or imprisonment not exceeding five years, or both. An act was defined to mean a single ticket sale. By disobeying the statute, therefore, the railroad companies would rapidly have incurred millions of dollars in potential penalties and the possibility of many years in prison for their employees.

Furthermore, in *St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63, 40 S. Ct. 71 (1919), the court, citing *Ex parte Young*, said that "the imposition of severe penalties as a means of enforcing a rate, * * * is in contravention of due process of law, [only] where no adequate opportunity is afforded the [plaintiff] for safely testing, in an appropriate judicial proceeding, the validity of the rate * * * before any liability for the penalties attaches." *Id.* at 64–65, 40 S. Ct. at 72.

Tikal had such an opportunity when it made the entries that were the subject of the voluntary disclosure. Had Tikal included the "notes" with its entries, Customs could have decided at that time whether the notes payments were dutiable. If Tikal disagreed with Customs' decision it could have filed a protest and initiated an action in this court if that protest were denied, with no risk of incurring a penalty. The fact that Tikal failed to avail itself of this opportunity does not render the statutory scheme constitutionally infirm.

> mation to apprise knowledgeable officials of the importer's intent and the relief sought.

Id. at 262, 377 F. Supp. at 960.[10]

This Court has jurisdiction under 28 U.S.C. § 1581(a) of a civil action commenced to contest the denial of a protest, in whole or in part. Such an action must be commenced within 180 days after the date of mailing of a notice of denial. *See* 28 U.S.C. § 2636(a)(1988). Under 19 U.S.C. § 1515(a)(1988), Customs is to review a protest and allow or deny it in whole or in part, within two years. Notice of the denial "shall be mailed in the form and manner prescribed by the Secretary. Such notice shall include a statement of the reasons for the denial, as well as a statement informing the protesting party of his right to file a civil action * * *." *Id.*

Although more than two years have passed since Plaintiff's protest letters were sent to Customs, Customs has yet to respond in writing to those letters.

Customs' failure to reply to a protest within the two-year time limit might constitute a denial of that protest. The plaintiff would be deemed to have exhausted administrative remedies and the court would exercise jurisdiction.[11] In this case, however, Tikal's summons was made just one year after its protests were sent. Thus, the Court did not have jurisdiction at the time Plaintiff initiated this action because the protest had not then been denied. Furthermore, Customs may not have realized that Tikal's letters were to be treated as protests. It is appropriate to afford Customs the opportunity to respond to Plaintiff's protests.

The Court will therefore dismiss this cause of action without prejudice. Plaintiff may request expedited consideration of its protest under 19 U.S.C. § 1515(b). If Customs fails to respond to such a request within 30 days, the protest would be deemed denied according to the terms of the statute and the Court would have jurisdiction under 28 U.S.C. § 1581(a).

CONCLUSION

The court concludes that with respect to the four entries at issue, Plaintiff has failed to state a claim upon which relief may be granted. With respect to the money tendered on December 20, 1991, the court concludes that neither this court nor the Court of Federal Claims has jurisdiction over a claim for refund of moneys paid voluntarily to qualify

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[10] The letter of Dec. 20, 1991, however, cannot reasonably be considered a protest. At the time the letter was sent, there was no Customs decision to protest. Under the statute "[a] protest of a decision, order, or finding * * * shall be filed with such customs officer within ninety days after *but not before*—(A) notice of liquidation or reliquidation, or (B) * * * the date of the decision as to which protest is made." 19 U.S.C. §1514(c)(2)(1988) (emphasis added).

[11] This two-year time limit does not start the 180–day statute of limitation against the individual seeking to contest the denial of such a protest. In *Knickerbocker Liquors Corp. v. United States*, 78 Cust. Ct. 192, 432 F. Supp. 1347 (1977), plaintiff filed a protest on April 26, 1972. Customs mailed a notice of denial on November 1, 1974, and plaintiff filed a summons on November 7, 1974. *Id.* at 193, 432 F. Supp. at 1349. Customs argued that the action should be dismissed because "the failure of a customs official to either allow or deny a protest within a period of two years * * * constitutes a constructive denial thereof, causing the 180–day time limitation to automatically begin running * * *." By the time the summons was filed, Customs argued, a total period of 196 days had elapsed from the end of the two-year period. The Court refused to dismiss the action, finding that the two-year time limit had been enacted to benefit importers, not Customs. "The specific obligation is imposed thereby on Customs to mail a notice of denial to a protestant. This section does not serve as a statute of limitation with respect to the commencement of an action, but only provides for the act or occurrence from which the 180–day time limitation * * * begins to run." *Id.* at 194, 432 F. Supp. at 1349.

for prior disclosure treatment pursuant to 19 U.S.C. §1592(c)(4). Therefore, Plaintiff's claims with respect to the $25,273 tendered on Dec. 20, 1991, and any duties paid on merchandise entered prior to Plaintiff's voluntary disclosure, are dismissed.

Finally, Plaintiff's letters of November 3, and December 2, 1994 are to be considered valid protests of Customs' determination that Plaintiff owes additional duties on merchandise entered subsequent to December 20, 1991. At the time Plaintiff initiated this cause of action Customs had not yet denied Plaintiff's protests in whole or in part, so Plaintiff could not have been considered to have exhausted its administrative remedies. The Court will dismiss all claims relating to duties paid on these entries as well.

(Slip Op. 97–87)

TIMKEN CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP., NTN CORP., KOYO SEIKO CO., LTD., KOYO CORP. OF U.S.A., NSK LTD., AND NSK CORP., DEFENDANT-INTERVENORS

Consolidated Court No. 94–01–00008

The Timken Company ("Timken") and NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation and NTN Corporation (collectively "NTN") challenge aspects of the Department of Commerce, International Trade Administration's ("Commerce") *Final Results of Redetermination Pursuant to Court Remand, The Timken Company v. United States, Slip Op. 96–86 (May 31, 1996) ("Remand Results").* The Remand Results pertain to issues arising out of the administrative review entitled *Final Results of Antidumping Duty Administrative Reviews; Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan*, 58 Fed. Reg. 64,720 (1993).

Timken, plaintiff, moves for an order directing Commerce to issue a second redetermination. Specifically, Timken challenges Commerce's decision to accept NTN's adjustment to its U.S. indirect selling expenses for imputed interest on cash deposits.

NTN, defendant-intervenor, claims Commerce erred in denying a level of trade adjustment for NTN's expenses.

Held: Plaintiff's motion for a second remand is denied. Commerce's decision to permit an adjustment to indirect selling expenses for imputed interest on cash deposits is consistent with law. Further, the Court concludes that Commerce properly denied a level of trade adjustment for NTN. The Remand Results are affirmed in all respects.

[Plaintiff's motion is denied. The Remand Results are affirmed. Case dismissed.]

(Dated July 3, 1997)

Stewart and Stewart (Terence P. Stewart, James R. Cannon, Jr., William A. Fennell and *Mara Burr)* for plaintiff.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Velta A. Melnbrencis);* of counsel: *Carlos A. Garcia*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Barnes, Richardson & Colburn (Donald J. Unger and *Jesse M. Gerson)* for defendant-intervenors NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation and NTN Corporation.

Powell, Goldstein, Frazer & Murphy (Peter O. Suchman, Neil R. Ellis and *Elizabeth C. Hafner)* for defendant-intervenors Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A.

Lipstein, Jaffe & Lawson, L.L.P. (Robert A. Lipstein, Matthew P. Jaffe and *Grace W. Lawson)* for defendant-intervenors NSK Ltd. and NSK Corporation.

OPINION

TSOUCALAS, *Senior Judge:* On May 31, 1996, this Court, in *Timken Co. v. United States*, 20 CIT ___, 930 F. Supp. 621 (1996), remanded to the Department of Commerce, International Trade Administration ("Commerce"), the final determination concerning the administrative reviews of the antidumping duty order concerning tapered roller bearings, entitled *Final Results of Antidumping Duty Administrative Reviews; Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan ("Final Results")*, 58 Fed. Reg. 64,720 (1993). The Final Results covered tapered roller bearings imported from Japan during the periods of October 1, 1990 through September 30, 1991, and October 1, 1991 through September 30, 1992. *See Final Results*, 58 Fed. Reg. at 64,720. The Court ordered Commerce to: (1) deny adjustment to foreign market value ("FMV") for pre-sale home market transportation expenses where FMV was calculated using purchase price; (2) explain its method for determining that the indirect expenses of NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation and NTN Corporation (collectively "NTN") varied across levels of trade and, if it is unable to do so, deny the adjustment; (3) provide evidence of tests performed to verify the accuracy of NTN's transfer prices and, if unable to do so, deny the adjustment and reallocate NTN's expenses without using transfer prices; (4) reallocate NTN's U.S. inland freight expenses from NTN's warehouse to its customers, NTN's U.S. indirect advertising expenses and NTN's U.S. indirect selling expenses; (5) provide a reasonable explanation for accepting NTN's downward adjustment to U.S. indirect selling expenses for interest paid on cash deposits; (6) deny the adjustment to FMV for home market billing expenses of Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. (collectively "Koyo"); (7) deny the adjustment to FMV for lump-sum billing adjustments of NSK Ltd. and NSK Corporation (collectively "NSK"); and (8) correct various clerical errors.

On November 21, 1996, Commerce released draft remand results and invited interested parties to comment. After receiving comments from The Timken Company ("Timken"), Koyo and NTN, Commerce filed its *Final Results of Redetermination Pursuant to Court Remand, The Timken Company v. United States, Slip Op. 96–86 (May 31, 1996) ("Remand Results").*

Plaintiff Timken moves for a second remand claiming that Commerce's decision to accept NTN's adjustment to its U.S. indirect selling

expenses for imputed interest on cash deposits was inconsistent with law.

Defendant-intervenor NTN contests Commerce's conclusion in the Remand Results that it could not accept NTN's allocation methodology as a basis for a level of trade adjustment.

1. *Imputed Interest on Cash Deposits:*

In the Final Results, Commerce deducted imputed interest for cash deposits from NTN's U.S. selling expenses. 58 Fed. Reg. at 64,726. In *Timken*, the Court remanded the issue to Commerce "to provide a reasonable explanation on the record for accepting NTN's downward adjustments to U.S. indirect selling expenses for interest paid on cash deposits." *Id.* at ____, 930 F. Supp. at 631. In the Remand Results, Commerce explains that it considers the imputed interest expenses at issue to be comparable to expenses for legal fees related to antidumping duty proceedings. Commerce emphasizes that the imputed interest expenses, like legal fees, were incurred only because of the existence of an antidumping duty order involving NTN. Commerce insists that imputed interest expenses are not selling expenses since they were not incurred to facilitate selling merchandise in the United States but, rather, to comply with the statute due to the existence of an antidumping duty order. *Remand Results* at 23–24.

Timken recognizes that this Court upheld Commerce's treatment of NTN's imputed interest expenses in *Federal-Mogul Corp. v. United States*, 20 CIT ____, ____, 950 F. Supp. 1179, 1183 (1996), *appeals docketed*, No. 97–1253 (Fed. Cir. Feb. 27, 1997), No. 97–1321 (Fed. Cir. Apr. 18, 1997). Timken asserts, however, that Commerce's detailed explanation in the Remand Results raises legal issues that must be addressed by the Court. Timken argues that the effect of Commerce's practice is to mask significant amounts of dumping. *Timken's Comments on Commerce's Remand Results* ("*Timken's Comments*") at 2–3. Timken further contends that Commerce's actions contravene the purpose of the antidumping statue by allowing respondents to delay the economic impact of deposits until liquidation. According to Timken, if Congress had intended the result created by Commerce's downward adjustment, Congress would have provided for interest payments on all deposits, not just overpayments. *Id.* at 6–7 (citing 19 U.S.C. § 1677g (1988)). Timken further contends that Commerce's actions are inconsistent with legislative intent. *Id.* at 8–13. Finally, Timken maintains that because Commerce's rationale for the adjustment appears to be based only on duty deposit overpayments, it was improper for Commerce to permit an adjustment for interest on all of NTN's cash deposits. *Id.* at 13–15.

Commerce responds that 19 U.S.C. § 1677a(e)(2) (1988) provides for a deduction to U.S. price only for expenses incurred to sell merchandise in the United States. Commerce insists that the interest expenses at issue, like legal fees, are not selling expenses and, therefore, are properly deductible from NTN's U.S. indirect selling expenses. Commerce emphasizes that a respondent possesses the discretion to eliminate price

discrimination upon the imposition of antidumping duties and that, while a company implements any changes, it still incurs a financing cost due to the statutory requirement of cash deposits. *Def.'s Response to Timken's Comments ("Def.'s Response")* at 3–5. Relying on *Federal-Mogul*, 20 CIT at ____, 950 F. Supp. at 1183, Commerce maintains that Timken has failed to demonstrate that Commerce's practice is inconsistent with law. *Def.'s Response* at 5–7.

Koyo and NTN, defendant-intervenors, agree with Commerce's decision to permit a downward adjustment for interest on cash deposits and supports Commerce's explanation in the Remand Results. *See Koyo's Comments on Def.'s Results of Redetermination* at 2–5; *NTN's Rebuttal to Timken's Comments* at 1–2.

As Timken acknowledges, this Court upheld Commerce's acceptance of a downward adjustment to indirect selling expenses for antidumping duty cash deposits in *Federal-Mogul*, 20 CIT at ____, 950 F. Supp. at 1183. Timken presents some new arguments in this case, but none alters the Court's conclusion that "the interest NTN paid for antidumping duty deposits is not a selling expense and, thus, should be excluded from NTN's U.S. indirect selling expenses." *Id.* Contrary to Timken's allegations, Congress has not addressed this issue. Timken has not pointed to anything in either the statute or the legislative history that prohibits the adjustment to indirect selling expenses. The statue requires cash deposits upon entry and interest on those deposits to be paid upon liquidation. *See* 19 U.S.C. §§ 1677g, 1673b(d)(2) (1988). The legislative history cited by Timken does not support its position, as Congress merely commented on the benefits of requiring cash deposits as opposed to bonds. *See Timken's Comments* at 9–12 (citing *Recommendations Submitted by Interested Individuals and Organizations on Amendments in U.S. Laws to Provide Relief From Unfair Trade Practices*, 95th Cong., 2d Sess. 21 (1978)). Commerce is not tampering with the requirement of cash deposits by permitting NTN's downward adjustment to indirect selling expenses.

In light of Congress's silence on this issue, the Court finds that Commerce acted reasonably and within its discretion by allowing the adjustment. As the Court stated in *Federal-Mogul*, 20 CIT at ____, 950 F. Supp. at 1183, "the adjustment to NTN's indirect selling expense reflects an actual expense to NTN that should not be included among NTN's selling expenses." Contrary to Timken's assertions, Commerce's rationale is not based on duty deposit overpayments. The passage in the Remand Results relied upon by Timken is the following:

> [W]hen a respondent finances cash deposits it incurs a financing expense which reflects the opportunity costs which arise when funds are used to pay cash deposits rather than other interest-yielding financial arrange-ments. Because the monies used to fund cash deposits for a given POR [period of review] are unavailable until final antidumping duties are assessed for that POR, this opportunity cost will accrue until liquidation.

Remand Results at 32. Commerce's statement reflects the reality that an importer incurs a financing cost due to cash deposits regardless of the amount of antidumping duties ultimately assessed. If an importer did not have to set aside funds for cash deposits, an importer could use that money to earn interest. In *Federal-Mogul*, this Court recognized a distinction between the interest allowed under the statute and the opportunity costs suffered by an importer. The Court stated that while the statute compensates an importer for the amount of cash deposit never actually owed, the adjustment compensates the importer for an actual expense that is independent of any refund due. *Federal-Mogul*, 20 CIT at ____, 950 F. Supp. at 1183. Thus, even if an importer is not entitled to have any amount of the cash deposit returned at the time of liquidation, the importer has incurred an opportunity cost by not having access to funds that could have been used for "other interest-yielding financial arrangements." *Remand Results* at 32. As such, Commerce's rationale supports an adjustment for imputed interest on the entire amount of the cash deposit rather than on only the overpayment. Therefore, the Court sustains Commerce's position on this issue.

2. *Level of Trade Adjustment for NTN:*

In the Final Results, Commerce accepted NTN's allocation of various indirect selling expenses based on levels of trade. 58 Fed. Reg. at 64,725. Addressing Timken's challenge, the Court remanded the Final Results to Commerce to explain how it determined that the indirect selling expenses varied across various levels of trade and, if it was unable to do so, to deny the adjustment. *Timken*, 20 CIT at ____, 930 F. Supp. at 629. In the Remand Results, Commerce concluded that NTN failed to provide any narrative or quantitative evidence demonstrating that the indirect selling expenses actually varied according to level of trade. Commerce concluded that "NTN's sole support for its allocations are the allocations themselves." *Remand Results* at 9. Accordingly, Commerce denied a level of trade adjustment for NTN's indirect selling expenses. *Id.* at 9–11.

According to NTN, Commerce possessed sufficient information from NTN to justify a level of trade adjustment. NTN specifically objects to Commerce's statement that the only support for NTN's allocations are NTN's allocations. *NTN's Comments on Commerce's Remand Results* at 1–2.

Commerce's decision in the Remand Results to deny a level of trade adjustment for NTN is consistent with the Court's decision and remand order in *Timken*, 20 CIT at ____, 930 F. Supp. at 628–29. In order to receive a level of trade adjustment, a respondent must demonstrate that the expenses at issue vary according to level of trade. *Id.* at ____, 930 F. Supp. at 628; *NTN Bearing Corp. of Am. v. United States*, 19 CIT ____, ____, 905 F. Supp. 1083, 1094–95 (1995). This Court has consistently upheld a denial of a level of trade adjustment where a respondent has failed to demonstrate that differences in price were directly attributable to differences in level of trade. *See, e.g.*, *Koyo Seiko Co. v. United States*,

20 CIT ___, ___, 932 F. Supp. 1488, 1493 (1996), *NTN Bearing Corp.*, 19 CIT at ___, 905 F. Supp. at 1094–95, *NTN Bearing Corp. of Am. v. United States*, 17 CIT 1149, 1154, 835 F. Supp. 646, 650 (1993). In the Remand Results, Commerce explained that it was unable to determine on the basis of the information provided by NTN whether expenses varied according to level of trade. *See Remand Results* at 8–10. Commerce's conclusion is supported by the record and consistent with law. Consequently, Commerce's decision to deny a level of trade adjustment for NTN is sustained.

3. *Other Issues:*

Pursuant to the Court remand order Commerce also addressed the following: (1) denied an adjustment for NTN to FMV for home market pre-sale inland freight expenses in instances in which Commerce compared FMV to purchase price; (2) deducted pre-sale inland freight expenses of NSK, NTN and Koyo from FMV pursuant to the exporter's sales price ("ESP") offset provision; (3) determined that NTN's transfer prices were unreliable and, therefore, reallocated all of NTN's U.S. expenses after excluding transfer prices; (4) denied an adjustment to FMV for Koyo's home market billing adjustments; (5) denied an adjustment to FMV for NSK's lump-sum post-sale price adjustments; and (6) corrected various clerical errors. The Court finds all of the above actions to be in accordance with the Court's remand order in *Timken* and consistent with law. Accordingly, the Court affirms Commerce's Remand Results.

CONCLUSION

In accordance with the foregoing opinion, the Court finds that Commerce's Remand Results are consistent with law and supported by substantial evidence on the record. Therefore, Commerce's Remand Results are affirmed and this case is dismissed.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C97/62 7/1/97 Tsoucalas, J.	Data-products Corp.	95–02–00134, 95–02–00194	3707.90.3000 8.5%	8473.30.50 Duty free	Agreed statement of facts	Los Angeles Toner cartridges

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